THE PARTICIPATION OF *AMICI CURIAE* IN THE AFRICAN HUMAN RIGHTS SYSTEM

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Thesis Submitted to the University of Bristol Law School in Fulfilment of the Requirements of the Degree of Doctor of Philosophy in Law

September 2018

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DEDICATION

This thesis is dedicated to the loving memory of my mother, Nelia Jonas

(1968 – 2004)

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ACKNOWLEDGEMENTS

I am profoudly grateful to my supervisors, Professor Rachel Murray and Dr Deyvani Prabhat, for their patient guidance, rich insights and time. I am also indebted to my family and friends for their abiding love and unfailing support. Last but not least, I thank the Almighty God for giving me the strength to complete this research.

AUTHOR'S DECLARATION

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's *Regulations and Code of Practice for Research Degree Programmes* and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, the work is the candidate's own work. Work done in collaboration with, or with the assistance of, others, is indicated as such. Any views expressed in the dissertation are those of the author.

SIGNED: ..... DATE: 18 SEPEMBER 2018

LIST OF ABBREVIATIONS

APDH	*Actions pour la Protection des droits de l'Homme*
APDHE	*Asociacion Pro Derechos Humanos de Espafia*
AU	African Union
BLR	Botswana Law Reports
CAFTA	Central America-United States Free Trade Agreement
CEMIRIDE	Centre For Minority Rights Development
COHRE	Centre of Housing Rights and Evictions
CPJ	*Comité Pour la Protection des Journalistes*
CSO	Civil Society Organisation
DSU	Dispute Settlement Understanding
EACJ	East African Court of Justice
EC	European Community
ECOWAS	Economic Community of West African States Court
ECOSOCC	Economic, Social and Cultural Council
FLEC	*Front de Liberation de L'Etat du Cabinda*
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IHRDA	Institute for Human Rights and Development in Africa
ISA	International Seabed Authority
MISA	Media Institute of Southern Africa
MRGI	Minority Rights Group International
NAFTA	North American Free Trade Agreement
NANHRIs	Network of African National Human Rights Institutions
NCCL	National Council for Civil Liberties
NCFAG	National Commission for the Fight against Genocide (Rwanda)

NGO	Non-Governmental Organisations
NHRIs	National Human Rights Institutions
OAS	Organisation of American States
OAU	Organisation of African Unity
OECD	Organisation for Economic Cooperation and Development
OPDP	Ogiek People's Development Programme
OSJI	Open Society Justice Initiative
PAHRDN	Pan African Human Rights Defenders Network
PALU	Pan African Lawyers' Union
PCIJ	Permanent Court of International Justice
PI	Pen International
PTA	Permanent Court of Arbitration
SA	South African Law Reports
SADC	Southern African Development Community
SALC	Southern African Litigation Centre
SCSL	Special Court for Sierra Leone
SERAC	Social and Economic Rights Action Centre
SERAP	Socio-Economic Rights and Accountability Project
TUC	Trade Union Congress
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNICEF	United Nations Children's Fund
UNLC	*Mouvement Pour Le Rassemblement Du Peuple Cabindais et Pour Sa Souverainete et Union Nationale de Liberation du Cabinda*
US	United States
VCLT	Viena Convention on the Law of Trearties
WANNP	World Association of Newspapers and News Publishers
WOZA	Women of Zimbabwe Arise
WTO	World Trade Organisation
WWF	World Wide Fund for Nature

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SUMMARY OF THE STUDY

Civil society has become a vital actor in the litigation of the African human rights system, thereby re-ordering African politics. Not only do its representatives act as litigants, but they also appear before the African judicial and quasi-judicial bodies as *amici curiae*. The present study therefore explores the process, practice and impact of the *amicus* device in the litigation before the African Commission, the African Court and the African Children's Rights Committee. Despite the commitment of these bodies to a bilateral model of litigation, private actors as well as states have nevertheless begun to forge for themselves a role as non-parties in their litigation.

However, the study notes that the *amicus* regulatory frameworks of the African judicial and quasi-judicial bodies are underspecified, incomprehensive and therefore inadequate for the effective management and control of third parties. Proper regulation of *amicus* participation would ensure that the interests of third parties in ventilating their opinions and the procedural rights of the parties are balanced. Regulation would also ensure that *amici curiae* do not place themselves in the way of a timely, cost-effective and efficient resolution of disputes.

The present study establishes that the *amicus curiae* has two principal functions in the African human rights system: First, it assists the African judicial and quasi-judicial mechanisms with factual information and legal arguments in the resolution of disputes. Despite the fact that *amicus* participation in the African system remains modest, a review of relevant cases shows that the African Commission and the African Court have begun to rely on *amicus* submissions in decision-making. The African Children's Committee merely recapitulated or summarised the submissions filed by the *amicus curiae* without referencing them at the evaluative part of the opinion, making the impact of the submission difficult to ascertain.

Second, the study establishes that *amici curiae* may help to overcome the democratic legitimacy deficit that haunts the African judicial and quasi-judicial bodies, by introducing the diverse views of African audiences into the decision-making processes of these mechanisms. However, the study notes that at present, the majority of third party intervenors before the African system are non-African NGOs which are naturally ill-suited to represent the interests of the African publics. African human rights civil

society should therefore stand at the cutting edge of this third-party initiative to alleviate these ‘outsider concerns’.

CHAPTER 1

INTRODUCTION

1.1 Background of the study

There are presently three major regional human rights systems in the world: the European, the Inter-American and the African human rights systems. Of the three, the African human rights system is the youngest.[1] The normative cornerstones of this system comprise a set of three treaties adopted under the aegis of the Organisation of African Unity (OAU) and its successor, the African Union (AU). These are the African Charter on Human and Peoples' Rights (the African Charter);[2] the Protocol to the African Charter on the Rights of Women in Africa (African Women's Protocol);[3] and the African Charter on the Rights and Welfare of the Child (the African Children's Charter).[4] Collectively, these instruments are referred to as the 'African Bill of Rights,' perhaps after the International Bill of Rights.[5] The African Charter is the principal human rights protection instrument in Africa.[6]

The African Commission on Human and Peoples' Rights (the African Commission), the only interpretive body originally established under the African Charter, which became operational in 1987; the African Court on Human and Peoples' Rights (the African Court), which came into being later in 2004 following the adoption of the additional Protocol to the African Charter;[7] and the fairly obscure African Committee of Experts on the Rights and Welfare of the Child (the African Children's Rights Committee) which, was inaugurated in 2001, are charged with the responsibility of interpreting and applying the rights proclaimed in these treaties. These collegial judicial and quasi-judicial bodies act as external correctives for compliance with these

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[1] C Heyns *et al* 'A schematic comparison of regional human rights systems: an update' (2006) 3/4 *SUR: International Journal on Human Rights* 162. See also F Viljoen 'From a cat into a lion? an overview of the progress and challenges of the African human right system at the African Commission's 25-year mark' (2013) 17/1 *Law, Democracy & Development* 299.
[2] Reprinted in C Heyns & M Killander *Compendium of key human rights documents of the African Union* (2006) 2.
[3] Ibid. 62.
[4] Ibid. 77.
[5] F Viljoen & A Abebe 'The participation of *amicus curiae* before regional human rights bodies in Africa' (2014) 58/1 *Journal of African Law* 22.
[6] AA Yusuf 'The progressive development of peoples' Rights in the African Charter and in the case law of the African Commission on Human and Peoples' Rights' in F Lenzerini & AF Vrdoljak (eds) *International law for common goods: normative perspectives on human rights, culture and nature* (2014) 41.
[7] Heyns & Killander (n 2 above) 41.

rights treaties by African states. In combination, the growing jurisprudence of these mechanisms clarifies the applicable norms and contributes towards the development of a pan-African human rights *jus commune*.

Moreover, several decisions delivered by these supranational institutions have been acknowledged as bearing considerable potential to offer remediation to victims of human rights abuses and prevent future violations on the continent.[8] These bodies have set themselves an ambitious task of stemming the tidal wave of human rights abuses, strengthening the rule of law, and thereby bending the arch of Africa's chequered history of human rights violations towards justice. It is hoped that their efforts will help in the attainment of the democratic values that constitute the professed ends of the African polity, as well as help to build the continent's 'public order', in which the ideal of human dignity is relentlessly pursued and effectively approximated.

The African Commission, the African Court and the African Children's Rights Committee collectively contribute towards the construction of a new *jus gentium* of the twenty-first century, in terms of which an individual can no longer suffer impotently and in silence the decisions or actions of his or her government, unable to vindicate his or her rights. However, the notable progress made by these mechanisms would not have been possible without the vital input by public-spirited Non-Governmental Organisations (NGOs) which litigate before them. In this regard, Mbelle points out that the jurisprudence of the African Commission, 'is undoubtedly a product of the efforts of NGOs to take what they consider will be precedent-setting cases.'[9]

Motala concurs that NGOs have made a vital contribution to the development of the jurisprudence of the African Commission 'in relation to almost every substantive provision of the Charter.'[10] The elaboration of norms in the region has been important

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[8] R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African Commission on Human and Peoples' Rights' (2014) 36/2 *Human Rights Quarterly* 350.

[9] N Mbelle 'The role of Non-Governmental Organisations and National Human Rights Institutions at the African Commission in MD Evans & R Murray (eds) *The African Charter on Human and Peoples Rights: the system in practice 1986 – 2006* (2008) 309. See also F Viljoen 'Promising profiles: an interview with the four new members of the African Commission on Human and Peoples' Rights' (2006) 6/1 *African Human Rights Law Journal* 244; R Murray 'The African Charter on Human and Peoples' Right 1987-2000: An overview of its progress and problems' (2001) 1/1 *African Human Rights Law Journal* 2.

[10] Z Motala 'Non-Governmental Organisations in the African human rights systems' in MD Evans & R Murray (eds) *The African Charter on Human and Peoples Rights: the system in practice 1986 – 2000* (2002) 257; SBO Gutto 'Non-Governmental Organisations, peoples' participation and the African Commission on Human and Peoples' Rights: emerging challenges to regional protection of human rights' (1992) *Human Rights in Developing Countries Yearbook* 42.

to those who have sought to move international human rights instruments from abstract theory to practice.[11] Civil society acts not only as petitioners before the African human rights judicial and quasi-judicial bodies but also intervenes as *amici curiae* – the focus of the present study. Since the 1990s, the *amicus curiae* has become an important term in the lexicon of international human rights adjudication. It has recently found its way into the African human rights discourse.

1.2 Objective of the study and research questions

Through a critical examination and nuanced systematisation of applicable rules and practices, the present study considers and appraises the participation of *amici curiae* before the African Commission, the African Court and the African's Children's Committee. According to Dolidze, scholarship is yet to theorise the role and significance of *amici curiae* in international judicial decision-making.[12] This lack of theorisation is more acute in the African human rights system, where the general role of civil society before the interpretive bodies of this system still remains under-researched.

The present thefore study attempts to bridge this gap in the literature by developing a clear and coherent theory about *amicus* participation in the African human rights system. It also answers the call for an evidence-based work on the question of *amicus* participation of *amici curiae* before the African system and contributes to current debates about the function of *amici curiae* in international adjudication. The main research question in this study is therefore: What is the role and significance of *amici curiae* participation in the African human rights system? A number of specific subsidiary questions will be dealt with in an endeavour to address the key research question, namely:

a. What is the place of *amici curiae* in the bilateral framework of international human rights litigation?

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[11] J Sarkin 'The African Commission on Human and People's Rights and the future African Court of Justice and Human Rights: comparative lessons from the European Court of Human Rights' (2011) 18/3 *South African Journal of International Affairs* 285-286.

[12] A Dolidze 'Making international property law: the role of *amici curiae* in international judicial decision-making' (2013) 40 *Syracuse Journal of International and Comparative Law* 121.

b. Do the regulatory regimes for *amicus* intervention of the African Commission, African Court and the African Children's Rights Committee allow for optimal and effective *amicus* participation?

c. To what extent does the filing of *amicus* briefs in the litigation of the interpretive organs of the African human rights assist in the process of judicial deliberation and analysis?

d. To what extent has the *amicus* device assisted in proffering the interpretive organs of the African human rights system with additional information and legal perspectives not contained in the direct parties' pleadings and/or submissions as well as in buttressing the parties' pleadings or arguments?

e. In what ways do *amici curiae* contribute to the amelioration of democratic deficit and enhance the sociological legitimacy of the African human rights system?

1.3 Conceptual and contextual clarifications

For purposes of contextualising and facilitating a better understanding of this study, certain terms and concepts that have been used in the title and body of the study are clarified, starting with the concept at the heart of the study, namely, *amicus curiae*. The concept of *amicus curiae* is amorphous in structure does not lend itself to a precise definition. As Bellhouse and Lavers write, 'there can be few technical legal terms or definitions as unhelpful as *amicus curiae*… Its meaning is still imprecise and obscure.'[13] Despite this, in Latin etymology, this concept has been loosely translated to mean a 'friend of the court'.

The foregoing defition has been criticised as idealistic and 'deceptively simple.'[14] This is because in some cases, the motive of intervention by the *amicus* is inconsitent with its conventional role of assiting the court. For instance, it often intervenes as a friend of a party, helping one party against the other. Despite these conceptual controversies, the traditional understanding of the concept of *amicus curiae* as a servant of the court

[13] J Bellhouse & A Lavers 'The modern *amicus curiae*: a role in arbitration?' (2004) 23 *Civil Justice Quarterly* 187.
[14] Ibid.

is still prevalent in literature and judicial pronouncements. The International Centre for the Settlement of Investment Disputes Tribunal (the ICSID Tribunal) has helpfully stated that an *amicus curiae* is:

> recognized in certain legal systems and more recently in a number of international proceedings. In such cases, a non-party to the dispute, as 'a friend,' offers to provide the court or tribunal its special perspectives, arguments, or expertise on the dispute, usually in the form of a written *amicus curiae* brief or submission.[15]

The modern *Law Lexicon* defines an *amicus curiae* as 'one, who volunteers or on invitation of the Court, instructs the Court on a matter of law concerning which the latter is doubtful or mistaken, or informs him on facts, a knowledge of which is necessary to a proper disposition of the case'.[16] The *Black's Law Dictionary* defines this term as '[a] person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.'[17] The lack of a standard definition of *amicus curiae* is due to the evolution and development of this concept in different legal environments and systems over many years.[18]

Although there may be conceptual linkages and overlaps in relation to various roles, a distinction must be made between an *amicus* on the one hand and related or cognate concepts such as a witness or expert, on the other. Moreover, although an *amicus* intervention is a third-party procedure to all intents and purposes, it must not be conflated or confused with the classical third-party intervention, with which it cohabits the same conceptual space. While intervening third parties are mostly parties to the treaty with the necessary *locus standi* and intervene in proceedings to protect their right(s) or legal interest(s) which are likely to be affected by the expected judgment of the court, an *amicus curiae* may not have any specific legal interest in the dispute but

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[15] *Aguas Argentinas SA and Others v Petition for Transparency and Participation as Amicus curiae*, ICSID Case no. ARB/03/19, para, 19 May 2005.
[16] PR Aiyar *The Law Lexicon* (1997) 102. See also ER Beckwith & R Sobernheim '*Amicus curiae*: minister of justice' (1948) 17/1 *Fordham Law Review* 38. See also LS Simard 'An empirical study of amici curiae in federal court: a fine balance of access, efficiency, and adversarialism' (2008) 27 *Review of Litigation* 675.
[17] BA Garner *Black's Law Dictionary* (2004) 93.
[18] SC Mohan 'The *amicus curiae*: friends no more?' (2010) *Singapore Journal of Legal* Studies 353.

nonetheless intervenes to bring information that is relevant for the resolution of the matter before the court.[19]

In other words, while the role of a third-party intervenor is to protect its own legal interest(s) in the proceedings, generally, the role of the *amicus curiae* is to assist the court. More critically, a classical third-party intervenor is entitled to have its submissions considered by the court while an *amicus curiae* is not so entitled.[20] Since an *amicus* is not party to the proceedings before the court, it is not bound by the decision of the court on the dispute (although it is affected by it), and therefore it can re-litigate the same case without being caught by the principle of *res judicata* and collateral estoppel. In this way, the *amicus* procedure creates an opportunity for the court or tribunal to have a re-look at the issues.[21]

It is important to be critical of terminology, because it may also obfuscate the juridical character of *amici curiae*. In some jurisdictions, such as the European human rights system, the term 'third party intervention' is preferred over '*amicus curiae*.'[22] However, this linguistic variation appears not to be of any material consequence. This study uses the functional approach and considers an *amicus curiae* as all forms of participation where a non-party files observations or statements to a proceeding with a view to helping the court to dispose of a case.[23]

Apart from its noted informational role, conventional wisdom holds that an *amicus* also represents public interest. The term public interest frequently appears alongside *amicus curiae* and seems to be at the base of its functions. Just as in the case of *amicus curiae*, no precise definition of public interest has so far been comprehensively developed within the law.[24] It has become commonplace among scholars who have studied the public interest law phenomenon to throw up their hands to the sky when it comes to constructing a comprehensive and precise definition of the concept. Many

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[19] PJ Sands & R Mackenzie *'*International courts and tribunals*' amicus curiae*' in R Wolfrum (ed.) *Max Planck Encyclopedia of Public International Law* (2011) 1.
[20] A Wiik *Amicus curiae participation before international courts and tribunals* (2018) 163 – 164.
[21] See *Stryker v Crane* 123 US. 527 at 540 & *Munoz v County of Imperial*, 677 f.2D 816.
[22] Viljoen & Abebe (n 5 above) 24.
[23] Compare Astrid Wiik (n 20 above) 33 – 35.
[24] MF Henríquez-Prieto & P Miranda-Nigro '*Amicus curiae* and ecosystem services: on public interest interventions to help resolve environmental controversies' (2017) 36/2 *Journal of Energy & Natural Resources Law* 209.

have a predilection to follow the lead of the US Supreme Court Justice Stevens who famously stated about pornography: 'I know it when I see it'.[25]

Despite the aforesaid conceptual difficulties, Justice Hantke-Domas has sought to contribute to the understanding of the concept of public interest by describing it as 'the motivation of public officials in exercising their functions to achieve the common good of the collective, by improving democracy and social and economic welfare.'[26] For purposes of this study, the concept of public interest includes all those interests that extend beyond those attaching to the parties to the dispute and have a bearing on the local, the national or the global community at large.[27] From this definition, one is able to deduce that *amici curiae* should be functionally equivalent to public officials who are inspired purely to achieve a common good. According to Hantke-Domas, an *amicus* intervention should be motivated by altruistic desires and motivations, solely to protect common societal interests such as respect for human rights.[28]

However, Hantke-Domas' understanding of the purpose of intervention is limited in that it excludes groups that seek to advance their own constitutive claims and perceptions about 'good' law in line with their own priorities. For Jaffe, public interest refers to an aggregation of individual interests which the intervening party shares 'with millions of others.'[29] Similarly, the Public Law Project has noted that '[t]here is no easy definition of what this means. In relation to litigation, we have used it to refer to cases which raise a serious issue which affects or may affect the public generally or a section of it.'[30] Public interest is associated with access to justice and the advancement of a common vision for public good or benefit.[31] Vague elements at the core of public

[25] E Rekosh 'Who defines the public interest?: public interest law strategies in Central and Eastern Europe' (2005) 2/2 *SUR: International Journal on Human Rights* 167.
[26] M Hantke-Domas 'Public Interest' in A Marciano & GB Ramello (eds) *Encyclopedia of Law and Economics* (2016) 1.
[27] Wiik (n 20 above) 53. See also DM Gruner 'Accounting for the public interest in international arbitration: the need for procedural and structural reform' (2003) 41/3 *Columbia Journal of Transnational Law* 929 – 932, stating that 'public interest refers to a set of values and norms that serve as ends towards which community strikes'.
[28] M Hantke-Domas (n 26 above) 1.
[29] LL Jaffe *Judicial control of administrative action* (1965) 484.
[30] JUSTICE Report: 'A Matter of Public Interest: reforming the law and practice on interventions in public interest cases' (1996) 4-5. Available at: https://booking.publiclawproject.org.uk/old-site/downloads/PublicInterest.pdf (accessed 07 July 2018).
[31] A Southworth 'What is public interest law? empirical perspectives on an old question' (2013) 62/2 *DePaul Law Review* 495.

interest law, especially the notion of underrepresentation, carry the possibility of the phrase's potentially extensive application.[32]

1.4 An outline of the research methodology

The present study is predominantly empirical and uses the qualitative research methodology. The objective is to search for empirical explanations for *amicus* interventions and the effect of such interventions in the African human rights system. A qualitative research method is '… an inquiry process of understanding based on distinct methodological traditions of inquiry that explores a social or human problem, based on a complex, holistic picture, formed with words, reporting detailed views of informants, and conducted in a natural setting.'[33] A qualitative inquiry seeks 'to discover, explain, and generate ideas or theories about the phenomenon under investigation; [and] to understand and explain social patterns (the "how" questions)'.[34]

The qualitative research technique allows for a deeper probing of the latent motivations, reasons and attitudes underlying particular practices or trends in a phenomenon being explored. Empirical approaches in legal discourses underline the fact that law is an applied discipline and, as Ulen notes, 'empirical work is an absolutely vital part of the development of a mature legal science.'[35] In many cases, legal theoretical and doctrinal postulations rest – in some instances precariously so – upon empirical assumptions and presuppositions.[36] The appetite for empirical analysis has developed rapidly among legal writers, and empirical research has emerged as an important subgenre of legal scholarship.[37]

Some writers are beginning to use interviews to assess the substantive impact of *amicus* briefs.[38] There is a new appreciation among these writers that *amicus*

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[32] Ibid. 497.
[33] JW Creswell *Qualitative inquiry and research design: choosing among five approaches* (2007)15.
[34] S Hesse-Biber & P Leavy *The practice of qualitative research* (2006) 49.
[35] TS Ulen 'A Nobel Prize in legal science: theory, empirical work, and the scientific method in the study of law' (2002) 4 *University of Illinois Law Review* 900.
[36] M Heise 'The past, present, and future of empirical legal scholarship: judicial decision making and the new empiricism' (2002) 4 *University of Illinois Law Review* 827.
[37] TJ Miles & CR Sunstein 'The new legal realism' (2008) 75/2 *University of Chicago Law Review* 833.
[38] For instance, AO Larsen 'The trouble with *amicus* facts' (2014) 100/8 *Virginia Law Review* 1757–818; J Perkins 'Why file? organized interests and *amicus* briefs in state courts of last resort' (2018) 39/2 *Justice System Journal* 39–53.

participation lies at the intersection between normative theory and empirical social science.[39] Collins Jr writes that a qualitative inquiry in the context of *amicus* participation allows for a 'rich understanding of how *amicus* submissions shape the legal doctrines enunciated in the court's opinions…'[40] Indeed, epistemological discussions about *amicus* intervention are not limited to abstract metaphysical reasoning or ideology, normative arguments and legal theories and doctrines, but can also be reduced to practical questions that are capable of being empirically framed. It is for this reason that the present study transcends mere theoretical debate by looking into the facts and evidence in order to provide a firm basis upon which theoretical canons about *amicus* participation in the African system might be established.

However, mainstream research in this area has predominantly adopted an observational approach by analysing the factors that correlate with the presence, or rate of *amicus* briefs filed in cases.[41] Collins Jr correctly encourages writers to move beyond observational studies on *amicus* participation and focus more on surveys and interviews.[42] While much critical insight into *amicus* activity has been gained from observational studies, these studies have also constrained our ability to probe issues that are not readily discernible through observational inquiries.[43] For instance, writers have persuasively established that *amici curiae* strive to influence case outcomes. However, it is not completely clear what this means. Nor is it clear whether or not *amicus* intervenors view influencing case outcomes in the same way.[44]

Some may perceive influence in terms of the development of the court's ideological direction. For others, influence may be gauged in terms of citation counts of the brief in the decision or having arguments contained in the brief incorporated in the decision

[39] PM Collins Jr. 'The use of *amicus* briefs' (2018) 14 *Annual Review of Law and Social Sciences* 4.11.
[40] PM Collins Jr. 'Interest groups and their influence on judicial policy' in KT McGuire (ed) *New directions in judicial politics* (2012) 234.
[41] See for instance, PM Collins & LA McCarthy 'Friends and Interveners: interest group litigation in a comparative context' (2017) 5/1 *Journal of Law and Courts* 55 - 80; SA Gleason & C Provost 'Representing the states before the U.S. Supreme Court: state *amicus* brief participation, the policy-making environment, and the Fourth Amendment' (2016) 46/2 *The Journal of Federalism* 248–273; TG Hansford 'Information provision, organizational constraints, and the decision to submit an *amicus curiae* brief in a U.S. Supreme Court Case' (2004) 57/2 *Political Research Quarterly* 219 – 230.
[42] Collins Jr (n 39 above) 4.3.
[43] Ibid.
[44] Ibid.

of the court.[45] For these writers, when the tribunal's decision incorporates the arguments made by *amici curiae* in its decision or uses the language found in the *amicus* brief, that brief has had an impact on the opinion, contributing towards the development of the law.[46]

It has been argued that '[t]he incidence of quotations could yield a truer approximation of the extent to which the Court has actually relied on *amicus* arguments, particularly when assessed on a relative basis over time.'[47] Still, other *amicus* intervenors may care only about developing precedents or generating media coverage for their cause.[48] Although the use of observational research designs may undoubtedly contribute to this conversation, these types of issues may better be dealt with through surveys and interviews with the filers and recipients of *amicus* briefs.[49]

In carrying out the present study, the following research participants were interviewed: members of the African Commission; judges of the African Court; members of the Court's Registry; members of the African Children's Committee, an official of its secretariat and members of civil society. The interviews were conducted between April 2017 and February 2018. The officials of the aforesaid tribunals have been included in this study as research participants because most of the previous studies conducted on *amicus curiae* participation have been undertaken from the point of view of the NGOs seeking to influence case outcomes and hardly anything empirical has been reported on the tribunals' perspectives.

It is thus important to gain better insights on the process by which briefs are processed or triaged by the tribunals. This will help to empirically establish how African judicial and quasi-judicial bodies perceive and deal with *amicus* interventions in practice, as well as how they may be influenced by *amicus* briefs, at least potentially, in judicial analysis. Although there is a broad consensus among writers that there is a growing

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[45] M Sjöholm *Gender sensitive norm interpretation by regional human rights law systems* (2017) 160. See also WM Landes *et al* 'Judicial influence: a citation analysis of federal courts of appeals judges' (1998) 27/2 *Journal of Legal Studies* 271-332.
[46] P Collins *et al* 'The Influence of *amicus curiae* briefs on U.S. Supreme Court opinion content' (2015) 49/4 *Law & Society Review* 920.
[47] JD Kearny & TW Merrill 'The influence of *amicus curiae* briefs on the Supreme Court' (2000) 148/3 *University of Pennsylvania Law Review* 578.
[48] Collins Jr. (n 39 above) 4.3.
[49] Ibid.

influence of *amicus* briefs in the litigation of international courts, measuring the impact of the contribution of these briefs on the courts' reasoning is a particularly difficult exercise.[50]

As already indicated, impact studies rely predominantly on citation counts contained in courts' decisions as an indicator of whether or not the court has relied on such a contribution in its decisions.[51] The number of citations a brief receives is read as the measure of its effectiveness.[52] Citation counts are often considered a useful measure in that a judge's decision to cite a brief shows that, at the very least, some aspects of the brief were considered relevant for judicial analysis.[53] It might be that the brief assisted in propelling an opinion, or provided a point of view against which the judge could develop his own line of thought. In either case, it can be rationally argued that citation counts are a helpful indicator for the usefulness of the brief.[54]

While in some cases courts have explicitly acknowledged the usefulness of filed briefs, and scholars have correctly taken this as proof of influence, this approach may, in some cases, be inadequate to precisely capture the impact that an *amicus* brief may have had in judicial analysis. Indeed, in some cases counts of citations in decisions may conceivably underrepresent the influence.[55] For Hafemeister and Melton, '[c]itations may be mere makeweight or post hoc rationalizations for views originating from other, unexpressed sources.'[56] It may also be plausible to suspect that judges rely on or cite *amicus* briefs that support their propositions and ignore them when they advocate a contrary position.[57] To this end, it is necessary to obtain discursive perspectives from officials tasked with processing and triaging briefs themselves as to what impact, if any, filed briefs have had on their decisions.

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[50] D Shelton *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, (1994) 88/4 *American Journal of International Law* 635. See Sjöholm (n 45 above) 160.
[51] RG Roesch *et al* 'Social science and the courts: the role of *amicus curiae* briefs' (1991) 15/1 *Law and Human Behavior* 3.
[52] BD Harper 'The effectiveness of state-filed *amicus* briefs at the United States Supreme Court' (2014)16/5 *Journal of Constitutional Law* 1506.
[53] Ibid.
[54] Ibid.
[55] Ibid. See also CR Tremper 'The high road to the bench: presenting research findings in appellate briefs' in GB Melton (ed.) *Reforming the law: Impact of child development research* (1987) 200.
[56] TL Hafemeister & GB Melton 'The impact of social science research on the judiciary' in GB *Melton (ed.) Reforming the law: Impact of child development research* (1987) 33.
[57] Roesch *et al* (n 51 above) 3.

In addition, the way in which a judge privately or cognitively forms an opinion on a case can be inscrutable from the outsider's standpoint. Therefore, a judge may draw inspiration, stimulation, or guidance from an *amicus* brief without expressly acknowledging or referencing it in the judgment. Obtaining the views of members of the tribunals on *amicus* briefs will help provide vital empirical insights so that reality can replace conjecture and facts replace claims. As already indicated, NGOs and other activist voluntary associations were also interviewed for this study. I interviewed both those with a history of involvement in the African human rights system as *amicus curiae* and those that have not yet intervened in the litigation of these bodies, but have the desire and necessary resource capacity to do so in future.

From the perspective of civil society, the research sought to establish their attitudes towards the filing of *amicus* briefs before the interpretive bodies of the African human rights systems: their motivations for filing briefs; the problems they encounter; and suggestions on how such problems, if any, could be addressed. The *modus operandi* for the qualitative research deployed in this study is in-depth, semi-structured and open-ended interviews. This approach was preferred in this study because it allows for a flexible and conversational engagement. It offers the researcher a distinct opportunity to formulate and ask impromptu questions during the course of the interview in order to follow up information leads, emergent ideas, and themes.[58]

This research approach allows interviewees to focus on matters that they consider relevant to themselves.[59] It also enables research participants to answer questions with more nuance than would have been possible if a different research methodology were to be used. According to Jones, this research approach is important in that:

> for one to understand other persons' constructions of reality, we would do well to ask them … and to ask them in such a way that they can tell us in their own terms (rather than those imposed

[58] H Alshenqeeti 'Interviewing as a data collection method: a critical review' (2014)/ 3/1 *English Linguistics Research* 40. See also Z Dörnyei *research methods in applied linguistics: quantitative qualitative, and mixed methodologies* (2007) 136.
[59] E de Leeuw 'Self-administered questionnaires and standardized interviews' in P Alasuutari *et al* (eds) *Sage Handbook of social science research methods* (2008) 317.

> rigidly and *a priori* by ourselves) and in a depth which addresses the rich context that is the substance of their meanings.[60]

Qualitative research methodology is particularly effective when the interpretivist approach is adopted, when the researcher aspires to gain an understanding of socially constructed life-realities and human action in given contexts.[61] It also enables the researcher to obtain as much relevant information as possible, while simultaneously allowing for the comparison of the results derived from individual interviewees, as well those obtained from specific courts.[62] In the present study, the researcher had face-to-face interactions with research participants and in some cases used self-completion (or self-administered) questionnaires, telephone or Skype, where face-to-face meetings proved impracticable.

In addition to interviews, and where possible, the texts of filed briefs were also relied upon, comparing their language and analytic approaches with those deployed in relevant decisions; checking if traces of opinions of intervenors could be found in resultant judgments. Based on such comparisons, preliminary observations or hypotheses were formed. As pointed out earlier, many writers hold the view that when a tribunal adopts language used in an *amicus* brief in its decisions, that fact attests to the fact that the brief in question influenced the tribunals' opinion.[63]

By triangulating among the diverse methods and approaches to *amicus* influence, we can gain useful insights into and comprehension of this important subject. However, it is also critical to note that copies of filed briefs are publicly accessible only if the intervening organisations publish them online on their respective websites or when directly sourced from the author where possible. Since this is not the case in relation to many of the briefs filed before the African regional judicial and quasi-judicial bodies, the briefs filed could not be fully and systematically analysed. In addition, *amicus* briefs by individuals are typically not publicly available and are difficult to obtain.

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[60] S Jones 'Depth Interviewing' in C Seale (ed.) *Social research methods: a reader* (2004) 258.
[61] U Jaremba & E Mak 'Interviewing judges in the transnational context' (2014) 2 *Law & Method* 8.
[62] Ibid.
[63] Landes *et al* (n 45 above) 271– 332; See also Collins Jr (n 46 above) 920.

1.5 Ethical considerations

Having outlined the methodological approaches adopted in this study, it remains to briefly touch upon ethical considerations. In this regard, it is important to note that the interviewees are elite people who are legally trained and capable of averting any harm that may emanate from their participation in the research. It must also be stated that in carrying out the interviews, the researcher was open to rendering anonymous any opinions of this elite group, if requested, to ensure that such opinions were confidential and therefore did not impact on their reputations. The decision on confidentiality was left to the interviewees, who were invited to decide for themselves whether they want their views to be anonymous or not. In addition, passages of this text where their opinions are quoted were sent to the interviewees to cross-check if such opinions had been correctly captured, and whether on reflection, they were still willing to be identified in the study or now preferred anonymity.

1.6 Structure of the study

This study is divided into seven chapters that follow a schematic and logical progression. The present chapter provides a brief background to the study. It also identifies the issues that will be investigated or considered, suggests the significance of the study, and describes the methodology used. The chapter also clarifies some of the rlevant concepts and contexts and ends by setting out the limitations of the study.

Chapter 2 challenges the adversarialism that is hard-wired in traditional international adjudication and proposes that the international judicial decision-making process must be accommodative to the public interest represented by *amici curiae*. It also stresses the fact that the participation of private actors like *amici curiae* in international litigation mirrors a broader phenomenon or practice of the involvement of non-state actors in international law.

Chapter 3 gives a general overview of the participation of *amici* institutions before peer international courts and tribunals. It seeks to show that *amicus curiae* interventions, especially by NGOs, have become a standard feature in international adjudication. Although the present study is not comparative, it discusses the development of *amicus* activity in the African human rights system against the backdrop of the *amicus*

practices, patterns and trends prevailing within other international dispute settlement fora.

Chapter 4 analyses the *amicus* regulatory frameworks of the African Commission, the African Court and the African Children's Rights Committee. It identifies gaps in the regulatory regimes of these bodies and makes proposals on how these weaknesses may be remedied to make *amicus* participation before them effective. In particular, it notes that the procedural frameworks for *amicus* participation in the African human rights system are underspecified and not comprehensive, and therefore inadequate for the effective management of *amicus* briefs.

Chapter 5 deals with the informational role of the *amici curiae* before the aforesaid judicial and quasi-judicial bodies. It appraises and assesses the role and significance of *amicus* participation in buttressing viewpoints as well as providing additional perspectives to enrich judicial analysis before these bodies. In the main, it argues that *amicus curiae* participation has the potential to enhance the reasoning and epistemic quality of the jurisprudence of these bodies as well as to influence the development of a pan-African legal policy in the region.

Chapter 6 reflects on the legitimatory potential of *amici curiae* in the African human rights system. It argues that the *amicus* procedure is an important opportunity, indeed, the only opportunity in international litigation that can be used by non-parties to channel a diversity of voices into a judicial forum in order to shape the discourse on critical legal and political policy and decision-making. In this way, this form of stakeholder participation furthers the democratic values of participation and deliberation. Thus, it has the potential to overcome the democratic deficit that haunts the international judiciary on account of its counter-majoritarian nature. The chapter argues that *amicus* participation is a badge of social legitimacy.

Chapter 7 concludes the study by tying together themes and findings arising from the preceding chapters and also sets out recommendations on how *amicus* participation can be made effective before the enforcement bodies of the African human rights system.

1.7 Limitations of the study

The African human rights system is still in its nascent stage. The enforcement mechanisms of the African human rights system have decided very few cases, making it difficult to draw very firm conclusions at this stage on the emerging patterns, trends and general direction of their practice, insofar as *amicus* interventions are concerned. This inevitably limits the researcher to drawing only tentative or preliminary conclusions in the study. Indeed, work on the emerging phenomenon of *amicus curiae* in international litigation in general and the African human rights system in particular is just beginning.

By clarifying the issues at play, this study seeks to lay the groundwork for further research. It must also be noted that for some writers, the African human rights system nomenclature includes the African sub-regional judicial institutions: the East African Court of Justice (EACJ); the Economic Community of West African States Court (ECOWAS Court); and the Southern African Development Community Tribunal (SADC Tribunal). This is despite the fact that these bodies are not human rights dedicated courts and are acting outside their primary area of competence when hearing human rights cases.

In fact, the human rights functions of these sub-regional courts has been recognised by the African Court, to the extent that these sub-regional bodies were invited to participate in a colloquium for Africa's human rights treaty organs operating in the field of human rights.[64] This seemingly insignificant event, when taken together with the fact that the dockets of these bodies are dominated by human rights claims, depicts a picture of an expanded African regional human rights system, with sub-regional building blocks.[65] African sub-regional tribunals are thus not to be dealt with in clinical isolation from the rest of the tribunals in the African human rights system.

Despite the fact that these bodies have in recent years dealt with cases that are of great significance to the human rights discourse – and have in some cases accepted

[64] The Colloquium of the African Human Rights Court and Similar Institutions, Arusha, Tanzania, 4 and 6 October 2010.
[65] S Ebobrah 'Human rights developments in African sub-regional economic communities during 2010' (2011) 11/1 *African Human Rights Law Journal* 217.

amicus briefs, they are not discussed in this study. They were deliberately omitted on account of the need to enhance the depth of the present study and also because primary materials relating to these bodies are not easily accessible. These judicial bodies present fertile avenues for fruitful future research on *amicus* participation, building on the present study.

CHAPTER 2

THE BILATERAL FRAMEWORK OF INTERNATIONAL LITIGATION

2.1 Introduction

International courts and tribunals partake in a bilateral model of litigation. This is because these bodies possess an express legal competence usually founded on a consensual act of delegation from states.[1] This chapter offers a critique of this bilateralist structure of international litigation and argues that it must be historicised and reconsidered as it fails to fully accommodate public interest, represented by *amici curiae*. Where a decision has deep-seated impact on general public interest, 'it would be outrageous for [a] tribunal to bluntly ignore any offer of assistance made by third parties claiming to voice the interest of the public.'[2] As seen in Chapter 1, the notion of public interest denotes a repository of interests that transcend individualistic concerns of parties to a dispute and therefore are not — or, at least, not fully — comprehensible in the context of the conventional bilateralist paradigm of international law.[3]

According to Wiik, 'the admission of an entity unrelated to the case before an international court or tribunal is anathema to the bilateral notion of international dispute settlement.'[4] Although the *amicus* device has become a key fixture of international litigation,[5] there have not been any serious academic efforts to square the international courts' reliance on *amicus curiae* briefs with their hardwired commitment to the adversarial justice system. Given the multipolarity of the modern international legal order, bilateral approaches impose an artificial constraint upon the perception of the dispute, and constitute an impediment to the development of conflict management structures that are adequately responsive to the expanding number and quality of concerns in dispute.[6]

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[1] KJ Alter *etal* 'How context shapes the authority of international courts' iCourts Working Paper Series, no 18 (2016) 8. See also T Stephens *International courts and environmental protection* (2009) 94.
[2] A Mourre 'Are *amici curiae* the proper response to the public's concerns on transparency in investment arbitration' (2006) 5/2 *The Law and Practice of International Courts and Tribunals* 266.
[3] B Simma 'From bilateralism to community interest in international law' (1994) 248.
[4] A Wiik *Amicus curiae participation before international courts and tribunals* (2018) 177 – 178.
[5] See chapter 3 below.
[6] L Kirchhoff *Constructive interventions:* paradigms, process and practice of international mediation (2008) 76.

It therefore seems inevitable that the bilateral paradigm of litigation should be significantly re-modelled to reflect contemporary conditions because 'bilateralism is no longer appropriate as the paradigm model for the regulation of activities on the international arena.'[7] Rather, both the multipolarity of disputes as well as the existence of third parties must be acknowledged as salient features of modern international dispute settlement law. As Chinkin argues:

> The changes in the subject matter of international law, in the participants in international activities, and in the arenas within which participants perform have exposed the inadequacies of the bilateral model for the accommodation of third parties, either as individual members of the international community, or collectively as the international community as a whole.[8]

In fact, nothing could be more incompatible with the very existence of public interest than the bilateralist conception of international law and the emphasis on the consent of states as the basis for the exercise of jurisdiction by a tribunal.[9] The increasing awareness of the existence of common interests in the international community, comprising not only of states but also of human beings, has impacted on the structure and processes of international law in profound ways.[10] In this regard, Judge Trindade has expressed the opinion that 'the growing consciousness of the need to bear in mind common values in pursuance of common interests has brought about a fundamental change in the outlook of international law in the last decade.'[11]

The internationalisation of the *amicus curiae* from the domestic legal order as will be discussed in Chapter 3, signifies the growing importance of public interest or the common concern doctrine in international law. Despite this development, the role and significance of *amicus curiae* is yet to be theorised in the context of the bilateralist structure of international judicial dispute settlement.[12] The existing literature on the role and significance of third party intervenors in international litigation, scarcely deals with the reformulation of the unremittingly and perversely adversarial international

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[7] C Chinkin *Third parties in international law* (1993) 3.
[8] Ibid.
[9] AAC Trindade *International law for humankind: towards a new jus gentium* (2013) 314.
[10] Simma (n 3 above) 234. See also Y Tanaka 'Protection of community interests in international law: the case of the law of the sea' (2001) 15 *Max Planck United Nations Yearbook* 1331.
[11] AAC Trindade 'International law for humankind: towards a new *Jus Gentium*' (2005) 316.
[12] A Dolidze 'Making international property law: the role of *amici curiae* in international judicial decision-making' (2013) 40 *Syracuse Journal of International and Comparative Law* 122.

litigation process which ignores the multipolarity of the international community, and the common goods that this community accommodates.

2.2 From a bipolar to a multipolar world order

To place the discussion into a proper perspective, it is important to give a historical background of the outlook of the international legal order in contrast to the present legal order. As shall be illustrated in passages that follow below, classical positivist international law was meant to govern the coexistence of states. It sought to delineate the respective territories within which each of the states into which the world is divided for political reasons is entitled to exercise its authority. In such a context, the bilateral model of dispute settlement proved adequate. The modern world is a multipolar compact comprising of states and non-state actors. Can the bilateralist framework of litigation still suffice?

2.2.1 The essence of bilateralism

Traditional international law had the typical function of regulating relations between states, in a framework of a horizontal and egalitarian structure of the international legal order.[13] It is essentially 'bilateral-minded.'[14] Allot captures the essence of this system of law by describing it as 'the minimal law necessary to enable state-societies to act as closed systems internally and to act as territory-owners in relation to each other.'[15] He states that the classic paradigm of international law is conceptualised in bilateralist terms and 'establishes a bipartite relation of multiple rights and obligations that altogether constitute a minimal law and are in a reciprocal character.'[16]

Similarly, Aust notes that traditionally, international law has been largely based on the private, contractual law and bilateralism model, since its primary concern was to govern the individual and 'egoistic' concerns of states.[17] The concept of state responsibility was characterised by a distinct orientation aimed at reciprocity and

[13] RP Mazzeschi 'Human Rights and the modernization of International Law' in F Lenzerini & AF Vrdoljak (eds) *International law for common goods: normative perspectives on human rights, culture and nature* (2014) 90.
[14] W Riphagen 'Third Report on State Responsibility' (1982) 2/1 *Yearbook of the International Law Commission* 36 & 38.
[15] P Allot *Eunomia, new order of a new world* (1994) 234.
[16] Ibid. 229.
[17] HP Aust *Complicity and the law of state responsibility* (2011) 13.

bilateralism.[18] Within this legal scheme, one state is the holder of a right and the other the holder of a duty, establishing a suite of rights and obligations among themselves akin to those established under the law of contract.[19] In other words, traditional international law is conceptualised on the understanding that 'one state owes a duty to another, the right-holding state.'[20]

Underlying such a bilateralist approach appears to be a theoretical conception of the structure of international law in terms of which the law is defined by the correlative rights and obligations of its subjects.[21] It is believed that this approach gives an orderly and methodical external 'appearance of the law because it facilitates a precise identification of who has a right or a claim against whom and who may enforce it.'[22] Thus, the application of classical international law was limited to sovereign states, premised on their bilateral legal relations, on the fundamentally and inherently bilateral character of legal accountability; in essence, again to use the words of Allot, predicated on a 'delict-property-contract ethos.'[23]

This bilateralism is embedded in state consent, a strong perception of state sovereignty and the prohibition of interference in the internal affairs of another state. The bilateralist logic has been transposed to international courts and tribunals. For instance, the litigation process of the International Court of Justice (ICJ) has been described as 'enervating bilateralism,'[24] and further as reflecting 'an old, tired view of international law.'[25] Modern international law remains:

> An international system which was, and is, post-feudal society set in amber. Undemocratized. Unsocialized. Capable only of generating so-called international relations, in which so-called states act in the name of so-called national interests, through the exercise of so-called power, carrying out so-called foreign policy conducted by means of diplomacy, punctuated by medieval

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[18] Ibid.
[19] EK Proukaki *Counter-measures, the non-injured state and the idea of international community* (2010)12.
[20] C Warbrick 'Book review: third parties in international law by Christine Chinkin' (1994) 43/2 *International and Comparative Law Quarterly* 468.
[21] B Simma 'International crimes: injury and countermeasures' in A Weiler *et al* (eds) *International crimes of state: a critical analysis of the ILC's draft article 19 on state responsibility* 283.
[22] Simma (n 3 above) 284.
[23] Allot (n 15 above) 335.
[24] *The North Sea Continental Shelf Case* (*Germany v Denmark*) [1969] ICJ Reports 3; Opinion of Judge Jennings para 32.
[25] *Accordance with international law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) (2010) ICJ Report 403. Declaration of Judge Simma, para 2.

> entertainments called wars or, in the miserable modern euphemism, armed conflict. This is the essence of the social process of the international non-society.[26]

Frozen in its bilateral frames, and without adapting to modern social realities, international law may be condemned to remain what it has always been –residual, marginal and intermittent.[27] Such an inflexible 'every man for himself' approach as Weil describes bilateralism,[28] constitutes a severe barrier obstructing the way to the establishment of a cosmopolitan conceptualisation of a global human rights culture, which is nurtured by all members of the international community, including individuals and NGOs. The limitations associated with the bilateral system have led to questions being asked about how issues that are of concern to mankind, such as human rights principles, which may not be brought before the courts on account of lack of formal standing, can be enforced.

2.2.2 The rise of community interests in the international legal system

The antithesis of the bilateral system discussed above consists of the introduction of community interests in the creation and development of international rules and principles in a different track, as it were.[29] Cursorily, community interests could be seen as a consensus in terms of which respect for certain basic values is not to be left to the free discretion of states, acting alone or in concert, but must be recognised and sanctioned by the international legal order as a matter of concern to all states, and the individuals comprising them.[30] As Mosler notes:

> International Law cannot be defined solely in terms of bilateral or multilateral relations between subjects which possess legal capacity. The collection of subjects participating in the international legal order constitutes a community living according to common rules of conduct.[31]

Indeed, the international legal system is at last overcoming functional deficits of the bilateral legal system and growing into what Simma calls 'a much more socially

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[26] P Allott *International law and international revolution: reconceiving the world* (1989) 10.
[27] Allott (n 15 above) 104; See F Lenzerini 'Introduction' in F Lenzerini & AF Vrdoljak (eds) *International law for common goods: normative perspectives on human rights, culture and nature* (2014) 2.
[28] P Weil 'Towards relative normativity in international law' (1983) 77/3 *American Journal of International Law* 431.
[29] Simma (n 3 above) 233.
[30] Ibid.
[31] H Mosler *International legal community* (1995) 2 *Encyclopedia of Public International Law* 1252.

conscious legal order.'[32] Departing from the decision in the *Lotus* case,[33] in terms of which states have a wide latitude of action as long as it does not fall foul a rule of international law, Judge Bedjaoui strenuously remarked that:

> It scarcely needs be said that the face of contemporary international society is markedly altered. … Witness the proliferation of international organisations, the gradual substitution of an international law of cooperation for traditional international law of co-existence, the emergence of the concept of "international community" … the resolutely positivist, voluntarist approach of international law still currently at the beginning of the [twentieth] century … has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of states organised as a community.[34]

The argument being sustained is that, the 'civilist' bilateralist scheme of International Law is proving inadequate to accommodate certain collective principles, as a result of the broadening of the circle of affected or interested actors in the international legal scene.[35] This is because international law has unquestionably entered a phase in which it cannot conceivably exhaust itself in the correlative rights and duties of its subjects, but also needs to incorporate the collective aspirations of mankind.[36] This thinking draws from the fact that this system of law is not a mere corpus of legal doctrine destined to regulate relations between states *inter se*, but rather that, it constitutes a 'comprehensive blueprint for social life.'[37] As already seen, this approach and the public sentiment it reflects bodes ill for the bilateralist structure of the international legal order. Writing about this intrinsic tension, Simma notes that:

> ... the observer is frequently torn between feelings of satisfaction because international law is finally being invested with some of the social accountability long developed in domestic law, and fears that the still primitive, still essentially bilateralist infrastructure upon which the new, more progressive edifices rest will turn out to be too weak to come to terms with the implications of such community interest.[38]

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[32] Simma (n 3 above) 233.
[33] *Lotus* case (*France v Turkey*) PCIJ 4, Judgment of 7 September 1927.
[34] Declaration of Judge Bedjaoui, *Legality of the Threat or Use of Nuclear Weapons* ICJ Reports 1996, 270, para13.
[35] B Simma 'Universality of international law from the perspective of a practitioner' (2009) 20/2 *European Journal of International Law* 268.
[36] Simma (n 3 above) 250.
[37] C Tomuschat *International law: ensuring the survival of mankind on the eve of a new century: general course on public international law* (1999) 63.
[38] B Simma (n 3 above) 249.

Simma notes that finally, community sentiment can be seen percolating the scheme of international law but wonders if it will be fully accommodated within the bilateral strictures of international law. Indeed, one must be cautiously optimistic because international jurisdiction is still positivist voluntarist in character, founded on state consent. Thus, the litigation model of international courts and tribunals is adversarial in character, and typically unsuited for public interest cases. Therefore, those arguing against the formalism of classic international law and the discontents of its litigation may look beyond state consent but cannot ignore it. However, it is clear that there is a growing acknowledgement of the interests of mankind in the international community. This development has begun to break the mould of bilateralism that has been embedded in the international legal system for centuries.

In particular, the human rights project has made international law to move inexorably towards a destination far beyond the contours of bilateralism. This is because the global or regional protection of human rights is an ideal that cannot realistically be pursued and achieved through the classic bilateralist legal imagination given the broad impact and publicness of this branch of the law. Thus, international human rights law is turning the state entity inside-out in virtually the most literal sense.[39] The 'genie of human rights has escaped from the bottle': human rights principles pervade virtually all spheres of international law.[40] It has become something akin to a 'worldwide secular religion'.[41] Although human rights provides a private benefit to the individual, it also provides public benefits to the international community – at least that is the theoretical logic behind the international human rights law project.[42]

2.3 The classical bilateral litigation model and its discontents

Because there is inadequate literature on the bilateral nature of international litigation, the present study will in some cases draw inspiration from the literature on the domestic adversarial model of litigation to develop its theoretical argument and offer

[39] Ibid. 233.
[40] B Simma 'The ICJ and common goods: the case of human rights' in F Lenzerini & AF Vrdoljak (eds) *International law for common goods: normative perspectives on human rights, culture and nature* (2014) 35.
[41] E Wiesel 'A tribute to human rights' in E Stamatopoulou *et al* (eds) *The Universal Declaration of Human Rights: Fifty years and beyond* (1999) 3.
[42] D Bodansky 'What's in a concept? global public goods, international law, and legitimacy' (2012) 23/3 *European Journal of International Law* 653.

illustrations. As already pointed out, litigation before international courts and tribunals is in principle predominantly adversarial or bilateral. This minimalist or monofunctional viewpoint of the international judiciary stems from the understanding that international courts and tribunals are instruments in the hands of the disputing parties for the resolution of concrete or discrete cases in a state centric world legal order.[43]

In terms of this understanding, international courts and tribunals decide disputes in the name of the states that created them, and these mechanisms are expected to maintain a scrupulous fidelity to this function.[44] Because it is the parties to the suit that control international litigation, it is non-participatory and not public interest-driven. In a purely bilateralist framework, the petitioner accuses the respondent state of violating his or her rights, which are guaranteed by one or more of the treaties that the state has signed and ratified to signify consent to be bound. The parties alone define the subject-matter of the dispute and they generally enjoy a monopoly of the fact-finding process with the court acting as a passive umpire.[45]

Decisions as to whether or not to initiate proceedings at all; how to plead the case (that is, what claims and defences to raise and which reliefs to seek); which evidence to lead and which legal submissions to advance are entirely left to the discretion of the parties.[46] In essence, the parties enjoy 'ownership' of the case. The court or tribunal bases its decision on the case as pleaded and argued by the record parties. The role of the court or tribunal in a bilateral setting is limited to establishing facts in dichotomic terms i.e it determines the dispute on the basis of an opposing normative set of viewpoints presented by the parties to the case.

Because litigation in an adversarial setting is mostly restricted to the parties to the dispute, it does not create an opportunity for participation by third or other international

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[43] A von Bogdandy & I Venzke 'On the functions of international courts: an appraisal in light of their burgeoning public authority' (2013) 26/1 *Leiden Journal of International Law* 59.
[44] Ibid.
[45] Ibid. Writing about his experiences at the bench Frankel observed that 'many judges, withdrawn from the fray, watch it with benign and detached affection, chuckling nostalgically now and then as the truth suffers injury or death in the process.' ME Frankel 'The search for truth: an umpireal view' (1975) 123/5 *University of Pennsylvania Law Review* 1034.
[46] JIH Jacob *The fabric of the English civil justice* (1987) 8. See also M Keyes *Jurisdiction in international litigation* (2005) 18.

actors.[47] In other words, the bilateralist litigation model leaves no room for interests transcending those of the parties to the dispute. In the words of Wolfrum, the 'bilateralization of a legal dispute which, as a consequence, limits the possibility to intervene is appropriate for truly bilateral relations but one has to acknowledge that international disputes rarely fit into a purely bilateral pattern.'[48] This model of litigation perfunctorily and erroneously assumes that the named parties' self-interest will ensure that all relevant material facts, evidence and legal submissions are presented and evaluated before the court.

An intervention by a third party is perceived as disruptive and 'an interference which may complicate the … settlement of the dispute.'[49] The philosophy of international litigation is that principal parties shall be left alone to litigate a case free from interference by strangers. This system obscures the critical fact that public law litigation or adjudication involves not only a private purpose of *inter-partes* dispute settlement that achieves 'private justice' but also a quintessentially public purpose. The further that decisions of international courts and tribunals depart from the *inter partes* rule, the more pressing the need for all potentially affected individuals to have a meaningful and effective opportunity to influence the outcome of those cases.[50]

As Shelton points out, '[r]arely is international litigation a matter of private concern or interest affecting only the parties. Even where narrow issues are presented, there may be broad human rights impacts.'[51] The exclusion of, or the limited access granted to *amici curiae* is another illustration of how international adjudicatory bodies are seen as instruments in the hands of the principal parties for resolving disputes in concrete

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[47] M Benzing 'Community interests in the procedure of international courts and tribunals (2006) 5/3 *The Law and Practice of International Courts and Tribunals* 376.
[48] R Wolfrum 'Interventions in proceedings before international courts and tribunals: to what extent may interventions serve the pursuance of community interests?' in N Boschiero *et al* (eds) *International courts and the development of international law: essays in honour of Tullio Treves* (2013) 220.
[49] Ibid. See also G Sgueo *Beyond networks – interlocutory coalitions, the European and Global legal orders* (2016) 123.
[50] LR Helfer 'The effectiveness of international adjudicators' in C Romano *et al* (eds) *The Oxford handbook of international adjudication* (2014) 473.
[51] D Shelton *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, (1994) 88/4 *American Journal of International Law* 614. A similar argument has been advanced in relation to the US Supreme Court. See GR Jimison '*Amicus* filings and international law: toward a global view of the United States Constitution (2005) 55/1 *Catholic University Law Review* 268.

cases.[52] If the *inter partes* rule were to be slavishly applied or followed, international adjudication would be extremely individualistic and inefficient.[53]

In addition, the participation of an *amicus curiae* in a case is also sometimes seen as creating an unjust situation of 'two against one' and therefore arouses a sense of fear that such an intervention may skew the adversarial process. This is because for some, the question of *amicus* intervention is not procedural at all but rather substantive and bears the power to unfairly tilt the balance of arms between the parties, creating an unacceptable disequilibrium and also undermining party autonomy.[54] The writers subscribing to this thinking believe that *amicus* interventions dislocate the basic structure of international litigation and pervert its purposes. It is sometimes said that equality of arms, as in the sense of a 'fair balance,' is linked to considerations that legal proceedings must, of necessity, be adversarial.[55]

For others, to admit an *amicus* intervenor in bilateral litigation might even appear to upset or unsettle the basic individualistic structure and thus compromise the integrity of the proceeding.[56] Critics also point out that in some cases, the motive of epistemic communities to influence case outcomes is not altruistic but that there is one set of values or constitutive claims that they are pursuing which is inconsistent with the goals of other participants in the dispute resolution process.[57] Discussing the adversarial model of litigation in domestic law, which bears virtually all the trappings of a bilateralist model of international law, Freedman writes that the basic assumption of the adversarial system of litigation is that the 'most efficient and fair way of determining the truth is by presenting the strongest possible case for each side of the controversy before an impartial judge or jury.'[58]

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[52] In detail, see R Wolfrum 'Intervention in the proceedings before the International Court of Justice and the International Tribunal for the Law of the Sea' in V Götz *et al* (eds.), *Liber Amicorum Günther Jaenicke – Zum* 427- 444.
[53] Helfer (n 50 above) 471.
[54] R Mackenzie 'The *amicus curiae* in international courts: towards common procedural approaches' in T Treves *et al* (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 299.
[55] K Reid *A practitioner's guide to the European Convention on Human Rights* (2004) 100.
[56] Ibid. See also C Harlow 'Public Law and Popular Justice' (2002) 65/1 *Modern Law Review* 2.
[57] N Klein 'Who litigates and why' in CPR Romano *et al* (eds) *The Oxford handbook of international adjudication* (2015) 575.
[58] M Freedman *Lawyers' ethics in an adversary system* (1975) 9.

Sandifer notes that the adversarial model of litigation is not concerned with the revelation of truth but rather to ensure that 'evidence is brought before the court in accordance with the established rules and to render a verdict in favour of the party who succeeded in presenting the most convincing evidence through the rules.'[59] The views expressed by these writers underscore the point that the bilateralist model of litigation imposes an unwanted constraint on the accommodation of common interests by the courts and constitutes an impediment to the development of international law which is responsive to the ever-expanding demands and concerns of the international society.[60]

Similarly, Fowkes writes that bilateralism is 'inappropriate in public interest contexts,' and it is 'the formal shackles from which litigation seeking substantive justice must break free.'[61] This bipolar model of litigation short-sightedly fixates the sight of the courts on the immediate material-political effects of their decisions while at the same time ignoring the long-term doctrinal effects of these decisions, which in turn impact on the development of international law. According to Chinkin, there exists an immanent conflict or tension in the position of intervenors in international curial processes which stems from the structure of the international legal order itself.[62] She further points out that:

> The bilateral formulation by parties of cases for presentation before adjudicative tribunals frequently does not take into account the multifaceted interests characteristically at stake in international disputes. International situations that culminate in claims are rarely bilateral, although it may be in the parties' interests to present them as such. More frequently the actions and reactions of States in their international dealings will impinge on the interests of other participants … Yet when the decision is made to resort to adjudication or arbitration these third-party interests are minimized, and the dispute is presented before the tribunal as bilateral.[63]

International litigation in general and international human rights litigation in particular is a multi-sided enterprise which turns on its head the ancient maxim that to every

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[59] D Sandifer *Evidence before international tribunals* (1975) 1.
[60] Chinkin (n 7 above) 2.
[61] J Fowkes 'Civil procedure in public interest litigation: tradition, collaboration and the managerial judge' (2012) 1/3 *Cambridge Journal of International and Comparative Law* 235.
[62] Chinkin (n 7 above) 147.
[63] Chinkin (n 7 above) 148. See also J Hermida 'A new model of application of international law in national courts: a transjudicial vision' (2003) 11 *Waikato Law Review* 49 – 50.

case there are two sides. In a seminal article that considers legal adversarialism in a postmodern, multicultural and post-structural world, Menkel-Meadow strenuously argues that: '[m]odern life presents us with complex legal problems, often requiring complex and multifaceted solutions.'[64] She correctly adds that the adversarial model of litigation is therefore scarcely adequate to resolve these multi-dimensional dilemmas.[65]

To build her argument, she notes, among other things, that litigators invariably seek to secure their clients' interests and 'win' the case, which may in reality entail simply 'obfuscating' the opponent's case, or leaving out critical facts if they are considered harmful or inconvenient.[66] In litigation, lawyers engage in what is called the fight theory, which derives from the origin of trials as substitutes for out-of-court private duels or brawls.[67] This theory posits that the principal aim of litigation is to organise facts in a manner suitable to the client's case.[68] Parties strive as hard as possible, in an intensely partisan spirit to bring before the court evidence favourable to their side of the case, ignoring what they consider inconvenient and thereby distorting the truth.

To be direct, the adversarial model lacks a singularly important quality, namely, the genuine ability to search for truth. That means that it cannot comprehensively address the full panoply of issues implicated in most human rights disputes. As Frankel notes, the adversarial process often attains truth 'only as a convenience, a by-product, or an accidental approximation.'[69] But, as Lord Denning of the British House of Lords reminds us, the court's objective 'above all, is to find out the truth, and to do justice according to law.'[70] In a similar language, Justice Stewart of the US Supreme Court has remarked that 'the basic purpose of a trial is the determination of truth.'[71]

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[64] C Menkel-Meadow 'The trouble with the adversary system in a postmodern, multicultural world' (1996) 38/1 *William and Mary Law Review* 7.
[65] Ibid.
[66] Ibid.
[67] J Frank *Courts on trial* (1950) 80 – 102.
[68] Ibid. 80; M Rustad & T Koenig 'The Supreme Court and junk social science: selective distortion in *amicus* briefs' (1993) 72/1 *North Carolina Law Review* 118. See generally, J Frank *The fight theory versus the truth theory* (1976).
[69] Quoted in Frankel (n 44 above) 1037.
[70] *Jones v National Coal Board* (1957) 2 QB 63.
[71] *Tehean v United States*, 382 US 416 (1966).

Although the above judicial pronouncements were made in the context of domestic law, they apply with equal measure to international litigation. Because truth is relative, interpretable, and cannot be established apodictically, it is necessary that the litigation process must be participatory so that all actors involved can use their expertise to throw some light on the dispute. The premise for this approach is that human rights audiences are characterised by a multiplicity of knowledge systems, all of which may have different perceptions about a particular human rights concern. Indeed, the globe is home to different cosmologies characterised by various knowledge systems, and, each of these may have different concepts of knowledge and truth and, in most times, these are indeed constitutive of dissimilar world realities. Given this relativity of truth, there will always be divergent (and partisan) views among various schools of thought, and thus clashes of ideas.

Competing ideas must be allowed free reign, each to establish itself as the truth; to be tested against counteracting material realities and therefore to enrich judicial analysis. No single answer is the right one; principles, legitimate difference and pluralism are at play. As a social interlocutor, the *amicus curiae* is thus best suited to offer assistance to a court or tribunal to search for truth and deliver a decision that is more likely to be informed by, and reflexive of a panoply of societal interests.[72] This device is part and parcel of a rich and broad-based ideational societal conversation. Certainly, a bipolar method entailing the oppositional representation of facts in a case does not present the best way for the court to search for the truth. In fact, a binary debate distorts the truth as illustrated earlier.[73]

In some cases, these distortions occur as a result of the exaggerated representation of opposing stories which tend to make the assessment of facts which fall somewhere in between or outside the scope of the submissions of the parties difficult to make.[74] Consequently, it is unduly self-limiting for a court of law to draw its knowledge about the dispute, the material facts, its political and socio-economic context, its possible

[72] R Karl 'States NGOs, and international environmental institutions' (1997) 41/4 *International Studies Quarterly* 719.
[73] Frankel (n 44 above) 1031.
[74] Menkel-Meadow (n 64 above) 17 – 18.

consequences, the implications of alternative decisions, and the relevant or applicable law solely from the materials submitted by parties to the dispute.

There is an intrinsic contradiction between truth-seeking on the one hand and the exclusion of other potential sources of relevant truth beside the parties on the other. The *amicus* brief is therefore vital in assisting the court to search for truth and approximate the public interest. With the benefit of input from *amici curiae*, litigation that would ordinarily end with a limited outcome sought by one party against the other is replaced by a more interactive and comprehensive process that seeks to produce a publicly desirable outcome. In the pursuit for truth, the *amicus* brief is strikingly similar or contiguous to the fact-finding methods of inquisitorial civil law systems in which a court may independently gather data or facts (often through experts) without relying on the disputing parties before it.[75] It is therefore contended that the *amicus* device has the potential to close the gap between a bilateral dispute resolution approach and public interest consequences.

Moreover, some human rights dilemmas may be too complex to be satisfactorily dealt with in a binary scheme of a court case. For the most part, a human rights case can present multiple and complex legal questions which require a comprehensive methodology to resolve, as opposed to the mutually exclusive accounts of the parties. As already argued, essential issues in a case, as well as relevant evidence and legal submissions, should not emanate solely from the duelling parties, nor exclusively from the public alone, but from their combination. This is the approach that should preside in and permeate the adjudication process of international human rights law. The argument being sustained is that the briefs by the primary parties to the suit circumscribe the truth: they should not be viewed as absolute frontiers of truth.[76] The natural limits of bilateralism tend to stem the supply of information from outside sources to the tribunal.[77] This bilateralism also finds expression in the traditional conception of a legal dispute in international law.

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[75] S Kochevar '*Amici curiae* in civil law jurisdictions' (2013) 122/6 *Yale Law Journal* 1653. See also JH Langbein 'The German advantage in civil procedure (1985) 52/4 *University of Chicago Law Review* 826.

[76] PC Mavroidis '*Amicus curiae* briefs before the WTO: much ado about nothing?' in A Von Bogdandy *et al* (eds) *European integration and international coordination: studies in the transnational economic law in honour of Claus-Dieter Ehlermann* (2002) 322.

[77] SL Wasby *The supreme court in the federal judicial system* (1984)102.

2.4 Reformulating the classical concept of a legal dispute

According to the classical positivist conceptualisation, a legal dispute is a disagreement between two parties (usually states) to a suit on a point of fact or law or a conflict of legal viewpoints or interests.[78] The basic assumption underlying international litigation is therefore that there are two opposing parties to a contentious case, and such an adversarial process is *res inter alios acta* in relation to third parties.[79] In the *Mavrommatis Palestine Concessions* case,[80] the Permanent Court of International Justice (PCIJ) defined a legal dispute as 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.'[81] Similarly, in the *Interpretations* case,[82] the ICJ spoke of a dispute as 'a situation in which the two sides [hold] clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations.'[83]

It has been said that what the PCIJ and ICJ had in mind in formulating the above definitions is that it necessarily follows as a matter of course that a legal dispute must be characterised by a certain measure of communication demonstrating opposing demands and denials between two parties.[84] Some international tribunals such as the

[78] R Wolfrum 'Interventions in the proceedings before international courts and tribunals: to what extent may interventions serve the pursuance of community interests?' in N Boschiero *et al* (eds) *International Courts and the development of international law* (2013) 220. For a relatively expansive conception, see Merills who defines a 'dispute' as 'a disagreement about something,' and an 'international dispute' as 'a disagreement, typically but not exclusively between states, with consequences on the international plane.' Notably, this definition breaks free from the hard mould of bilateralism. JG Merrills 'The means of dispute settlement' in MD Evans (ed.) *International Law* (2010) 559.
[79] S Rosenne *The law and practice of the International Court 1920-2005* (2006) 1439.
[80] *Mavrommatis Palestine Concessions* (Greece *v* Great Britain), [1924] PCIJ (Ser. A) no. 2, Judgment of 30 August 1924.
[81] Ibid. 11.
[82] *Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania,* Advisory Opinion of 30 March 1950 (first phase), 1950 ICJ Reports 65.
[83] Ibid 74. See also *Certain Property (Liechtenstein/Germany), Preliminary Objections*, [2005] ICJ Reports, para. 24. See also *South West Africa, Preliminary Objections,* Judgment, [1962] ICJ Reports 328, where the Court remarked that '[i]t must be shown that the claim of one party is positively opposed by the other.' EA Posner & John C Yoo 'Judicial independence in international tribunals' (2005) 93/1 *California Law Review* 28-29.
[84] C Schreuer 'What is a dispute?' in I Buffard, *et al* (eds.) *International law between universalism and fragmentation Festschrift in honour of Gerhard Hafner* (2008) 965.

International Tribunal of the Law of the Sea (ITLOS)[85] and ICSID[86] have also adopted the above triadic definition of a 'legal dispute' drawing on the jurisprudence of the International Court.

Inspired by the doctrine of legal positivism, many writers in this area continue to analyse international litigation as a value-free dynamic between a triad: namely, the two adversary parties and the impartial adjudicator.[87] The most noted proponent of this theory is Shapiro who notes that the logic of dispute resolution requires a triadic structure, i.e the two adversarial parties and the decision maker. The decision-maker is clothed with a measure of authority to hear the case because the parties have consented to such a function.[88] Shapiro argues that a prototypical supranational litigation comprises, '(a) an independent judge applying (b) pre-existing legal norms (c) adversary proceedings in order to achieve (d) a dichotomous decision in which one of the parties was assigned the legal wrong and the other found wrong.'[89]

Similarly, according to Paulus, classical or conventional dispute settlement entails the resolution of a dispute between two or more parties by an independent and impartial decision maker, 'ideally a court or an arbitral tribunal, in an adversarial procedure on the basis of international law.'[90] For his part, Hopmann writes that 'international courts … are often introduced to arbitrate disputes. In this instance, the arbitrator listens to the arguments of the two sides and then renders a decision that is binding on the parties.'[91] Likewise, in constructing a normative and prescriptive theory to explain the

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[85] *Southern Bluefin Tuna Cases* (*New Zealand v Japan; Australia v Japan*), [1999] ITLOS Reports [1999] 293, para. 44, Decision of 4 August 2000; See also Joint separate opinion of Judge Wolfrum and Judge Cot in the *ARA Libertad* case (*Argentina v Ghana*) ITLOS Case no. 20, [2012] para. 21, Decision of 15 December 2012.

[86] For instance, see *Maffezini v Spain*, ICSID Case no. ARB/97/7 107, paras. 93 & 94, Award of 25 January 2000; *Tokios Tokelės v Ukraine*, ICSID Case no. ARB/02/18, paras. 106, 107, Award of 29 April 2004; *Lucchetti v Peru*, ICSID Case no. ARB/03/4, para. 48, Award of 7 February 2005.

[87] Dolidze (n 12 above) 121. See also JE Alvarez *The impact of international organisations on international law* (2017) 273-274.

[88] M Shapiro *Courts: a comparative and political analysis* (1983) 2. See generally, AS Sweet 'Judicialization and the construction of governance' (1999) 32/2 *Comparative Political Studies* 147-184. See also R Bilder 'Adjudication: international arbitral tribunals and courts' in I W Zartman & J L Rasmussen (eds) *Peace-making in international conflict: methods and techniques* (1997) 195.

[89] Shapiro, Ibid. 147. See also DD Caron 'Towards a political theory of international courts and tribunals' (2006) 24/2 *Berkeley Journal of International Law* 407.

[90] A Paulus 'International adjudication' in S Besson & J Tasioulas (eds) *The philosophy of international law* (2010) 210.

[91] P T Hopmann *The negotiation process and the resolution of international conflicts* (1996) 228.

effectiveness of international courts and tribunals, Helfer and Slaughter also make reference to the triadic relationship between the court and the disputing parties.[92]

Drawing on Shapiro's triadic formulation, Grossmann points out that a legitimate court process provides litigants with equal opportunities to put across their viewpoints both orally and in writing and to reply to the opposing party.[93] Thereafter, an open-minded and impartial decision-maker will evaluate the arguments and render a decision that one or both litigants may be dissatisfied with, but remains authoritative nonetheless.[94] The concept of international adjudication as a triadic structure obscures and underrates the critical contribution that non-parties, such as *amici curiae*, can play in international judicial-decision-making. The limitations of the classical concept of law characterised by bilateralism and the rigid doctrine of state consent have been circumvented by the emphasis on the imperative that international law must be used as an instrument of change.[95] At the forefront of these changes is international human rights law.

2.5 International human rights litigation

International human rights litigation is a relatively new phenomenon.[96] Because of their fundamental role in enforcing public interest, regional human rights judicial and quasi-judicial bodies are strongly influenced by ideas of public law and have markedly deviated from the bilateralist orientation of classical international litigation. As von Bogdandy and Venzke point out, 'the traditional one-dimensional view of international judicial practice clearly breaks down if cast onto younger international institutions in the field of human rights...'[97] This is because human rights courts and tribunals are giving opinions which, like those of domestic constitutional courts, do not merely resolve the disputes brought before them by the parties, but also stimulate and inform

[92] LR Helfer & A-M Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107/2 *Yale Law Journal* 283. See KJ Alter 'Do international courts enhance compliance with international law?' (2003) 25 *Review of Asian and Pacific Studies* 51.
[93] N Grossman 'The normative legitimacy of international courts' (2013) 86/1 *Temple Law Review* 67.
[94] Ibid.
[95] C Turner 'Human Rights and the Empire of (International) Law' (2011) 29/2 *Law & Inequality: a Journal of Theory and Practice* 341. See also D Orentlicher 'Settling accounts: the duty to prosecute human rights violations of a prior regime' 100/8 *Yale Law Journal* 2549.
[96] C Chinkin 'Sources' in D Moeckli *et al International human rights law* (2010) 88.
[97] E Bates *The evolution of the European Convention on Human Rights* (2010) 66.

ongoing legal, social and political dialogue on human rights issues. They become part and parcel of a rich and varied dialogue in society.[98]

Deeply embedded in emerging international legal theory is the understanding that international human rights norms are an expression of universal values that must apply, regardless of national frontiers or the choice of political systems in different countries. These norms are said to have a binding effect on states without the need for their prior consent or regard for their domestic processes. Rubenfeld refers to this phenomenon as 'international constitutionalism', because the normative content of these rights is determined by international judges and other experts without regard to internal democratic politics.[99] To be direct, and as discussed in detail in Chapter 6, decisions of international human rights courts and tribunals have *erga omnes* effects.[100]

It has been said that '[t]he intention behind the *erga omnes* theory… is to sound the death knell of narrow bilateralism and sanctified egoism for the sake of the universal protection of fundamental norms relating, in particular, to human rights.'[101] The ICJ has also emphasised that obligations arising from such norms include the enforcement of basic rights.[102] As scholarship in this area shows, *erga omnes* norms are the concern for the entire mankind. Therefore, all states can be taken to have a legal interest in their protection.[103] The consequence arising from this is that all actors in the international legal system would have standing to demand the enforcement of these obligations. Reflecting on the emergence of *erga omnes* norms in international law, Rosenne writes that it seems:

> That something needs to be done to bring international procedural law into line with that […] International judicial procedure, although it has developed remarkably especially since 1945, is

[98] HJ Steiner 'Individual claims in a world of massive violations: what role for Human Rights Committee?' in P Alston & J Crawford (eds) *The Future of UN Human Rights Treaty Monitoring* (2000) 41.
[99] J Rubenfeld 'Unilateralism and constitutionalism' (2004) 79/6 *New York University Law Review* 1999.
[100] The Latin expression *erga omnes*, means 'flow to all' See Helfer (n 50 above) 471.
[101] Weil (n 28 above) 432.
[102] *Barcelona Traction*, *Light and Power Company, Limited* (*Belgium v Spain*) 1970 ICJ 32.
[103] S Villalpando 'The legal dimension of the international community: how community interests are protected in international law' (2010) 21/2 *European Journal International Law* 401. See also J Dugard '1966 and all that: the South West African judgment revisited in the East Timor case' (1996) 8/3 *African Journal of International and Comparative Law* 549.

> still cast in a XIXth century mould, and the strict bilateralism of international litigation is one of its hallmarks.[104]

A general concern has been expressed that despite the growing dominance of international courts on the global stage, 'no new theory accompanies them. We continue to think about international adjudication in view of ideas and proposals dating back to around the turn of the twentieth century.'[105] It is submitted that the involvement of *amicus curiae* in international litigation may address the concerns raised by Rosenne to a large degree and alter the bilateral dynamic at play in international litigation. Indeed, Shelton argues that, 'particularly where obligations *erga omnes* are at issue, a role for non-governmental *amici* would seem appropriate.'[106] The *erga omnes* effect of judgments of supranational bodies is more pronounced in the context of the human rights system.[107] The discussion will then turn to consider how the phenomenon of the *erga omnes* effect played out in the European, Inter-American and African human rights systems.

2.5.1 The European system

Dolidze notes that the European Court of Human Rights (the European Court) allowed the filing of *amicus* briefs when the effects of its interpretation and application of the European Convention of Human Rights (European Convention)[108] were being felt beyond the parties to a particular case.[109] Commentators have thus noted that the European Court is increasingly assuming a role akin to that of a constitutional court.[110]

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[104] S Rosenne 'Decolonisation in the International Court of Justice' (1996) *African Journal of International and Comparative Law* 567, 571 & 576.
[105] M Koskenniemi 'The ideology of international adjudication and the 1907 Hague Conference' in Y Daudet (ed.) *Topicality of the 1907 Hague Conference, The Second Peace Conference* (2008) 127; See also A von Bogdandy & I Venzke 'Beyond dispute: international judicial institutions as lawmakers' (2011) 12/5 *German Law Journal* 980, noting that 'neither theory nor doctrine has yet adequately captured' to adequate account for the proliferation and development of international judicial organs).
[106] Shelton (n 51 above) 627.
[107] See A Bodnar '*Res interpretata*: legal effect of the European Court of Human Rights' judgments for other states than those which were party to the proceedings' in Y Haeck & E Brems (eds) *Human rights and civil liberties in the 21st Century* (2013) 223 – 262. See also OM Arnardóttir '*Res Interpretata, Erga omnes* effect and the role of the margin of appreciation in giving domestic effect to the judgments of the European Court of Human Rights' (2017) 28/3 *European Journal of International Law* 819 – 843.
[108] The Convention was opened for signature on 4 November 1950 in Rome. It entered into force on 3 September 1953.
[109] A Dolidze 'Bridging comparative and international law: *amicus curiae* participation as a vertical legal transplant' (2015) 26/4 *European Journal of International Law* 853.
[110] L Hodson *NGOs and the struggle for human rights in Europe* (2011) 33.

This quasi-constitutionalist orientation is cemented by the constitutional status that the Convention enjoys in various European countries. For instance, in Austria this instrument has equal status with that country's Constitution. In the Netherlands, the Convention ranks higher than the Constitution.[111]

It has been said that the European Court serves not only to deliver justice between the parties to the suit but also serves the public order of the European Community (EC).[112] In *Loizidou v Turkey*,[113] the European Court eschewed a mechanical and restrictive approach to dispute resolution that might not only 'seriously weaken' its role in the discharge of its functions but 'would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*).'[114] It has been stated in relation to the European Court that '[t]he core issue is not to settle a bilateral dispute, but to protect individual rights.'[115]

In *Tyrer v UK*,[116] a request by the petitioner to withdraw an application was refused by the Commission (a decision endorsed by the Court) on the basis that the case 'raised questions of a general character affecting the observance of the Convention which necessitated a further examination of the issues involved'[117] In *Marcks v Belgium*,[118] the Court specifically recognised that its judgments have *erga omnes* effects, i.e 'the effects extending beyond the confines of this particular case' within the general legal order of the respondent state.[119] In much clearer terms, the European Court stated in *Ireland v the UK*[120] that:

> The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally to elucidate, safeguard and develop the rules instituted by the Convention,

[111] N Bürli *Third party intervention before the European Court of Human Rights* (2017) 26. See also S Gardbaum 'Human rights as international constitutional rights' (2008) 19/4 *European Journal of International* Law 760.
[112] Hodson (n 110 above) 33.
[113] Application no. 40/1993/435/514, A, (1996) 21 EHRR 188, judgment of 18th December 1996.
[114] Ibid para 75.
[115] A Bogdandy & I Venzke *In whose name?: a public law theory of international adjudication* (2014) 70.
[116] *Tyrer v UK*, Applications 5856/72, [1978] 2 EHRR 1 [1978] ECHR 2, Judgment of 25 April1978.
[117] Ibid. 24 – 25. See also C Gray *Judicial remedies in international law* (1987) 151.
[118] Application no. 40/1993/435/514, [1996] 21 EHRR 188, Judgment of 18 December 1996.
[119] Ibid. para 58.
[120] Application no. 5310/71 [1978] 2 EHRR 25, Judgment of 18 January 1978.

> thereby contributing to the observance, by the states, of the engagements undertaken by them as Contracting Parties.[121]

Similarly, in *Opuz v Turkey*[122] the Court ruled that in its assessment of compliance with the Convention, it will look into the question of 'whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other states.'[123] In *Karner v Austria*[124] it was noted that although the *raison d'être* of the European Court is to provide individual redress, its aim is also to decide cases on public-policy considerations, 'thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of Convention States.'[125]

In addition, a 2010 report by the Council of Europe lists countries that have amended their statutes following judgments by the European Court condemning similar laws enacted by other states.[126] Summarising the *erga omnes* nature of the decisions of the European Court, Brems and Lavrysen relevantly and helpfully state that:

> The Court should have an eye for stakeholders who may not be among the formal parties in the case: the arguments advanced by the [defendant state] may be representative of a (smaller or larger) part of its population while third parties (other states or nongovernmental organizations (NGOs)) may also represent widely shared views or interests. Since the judgment will have authority beyond the parties and outside the state concerned, citizens all over Europe (and beyond) may expect to see their concerns taken seriously in the Court's judgments.[127]

There is general consensus emerging from the Strasbourg jurisprudence that 'the maintenance and further realisation of fundamental freedoms' in Europe and the 'achievement of greater unity between its members' requires an expansive understanding of the Court's mission and vision, not only as regards the conditions for the admission of petitions before the Court and the striking out of non-compliant

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[121] Ibid. 62.
[122] Application no. 33401/02, [2009] 50 EHRR 28, Judgment of 09 June 2009.
[123] Ibid. para 162.
[124] Application no. 40016/98 [2003] 38 EHRR 528, Judgment of 24 July 2003.
[125] Ibid. para 26.
[126] Report, Committee on Legal Affairs and Human Rights, 'Strengthening Subsidiarity—Integrating the Court's Case-Law into National Law and Judicial Practice' (Oct. 1–2, 2010), < http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf > (accessed 29 March 2018).
[127] E Brems & L Lavrysen 'Procedural justice in human rights adjudication: the European Court of Human Rights' (2013) 35/1 *Human Rights Quarterly* 186.

applications but also the effects of its decisions.[128] As Hodson notes, the contemporary significance of the Court resides less in its function as an adjudicator in the 'epic battle' between the individual on the one hand and the nation-state on the other, but more in the democratic space that it provides to interest groups seeking to bring about legal and policy changes.[129]

2.5.2 The Inter-American system

As in the case of the European Court, decisions of the Inter-American Court of Human Rights (Inter-American Court) have effects that transcend the immediate interests of the direct parties to the dispute and are felt in the entire region. The Inter-American Court itself has stated that its interpretation of the Inter-American Convention on Human Rights (Inter-American Convention)[130] is 'guided by considerations of a superior general interest or *ordre* public which transcend the individual interests of [the parties].'[131] In more concrete terms, the Inter-American Court noted in *Almonacid v Chile*,[132] that:

> When a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception. In other words, the Judiciary must exercise a sort of 'conventionality control' between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. *To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter- American Court, which is the ultimate interpreter of the American Convention*.[133] [Italics supplied]

In this passage, the Court brings to the attention of national judiciaries that in making reference to the Convention, its jurisprudence must be the touchstone in determining whether or not a law, policy or conduct of a contracting state is compliant with the

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[128] PP de Albuquerque 'The European court of Human Rights as the constitutional court' in DM Vicente (ed.) *Towards a universal justice? Putting international courts and jurisdictions into perspective (*2016) 90. See also P Johnson *Homosexuality and the European Court of Human Rights* (2013) 176.
[129] Hodson (n 110 above) 34.
[130] Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.
[131] *Caesar v Trinidad and Tobago*, IACtHR (Ser C) no. 123 [2005], para 6, Judgment of 11 March 2005.
[132] *Almonacid v Chile* IACHR (Ser C) no. 154 [2006], Judgment of 26 September 2006.
[133] Ibid. 124.

script of the Convention.[134] After being applied first in the *Almonacid* case, this approach was affirmed in subsequent cases.[135] High Courts in Colombia and Peru have struck down amnesty laws on the basis of judgments handed down by the Inter-American Court, invalidating similar amnesty laws in Peru.[136]

2.5.3 The African system

The adjudicatory bodies of the African human rights system have not yet pronounced themselves on the *erga omnes* effect of their decisions. However, there is no doubt that their decisions have implications even for states which were not parties to the case before them. This is particularly true if the lessons from the European and Inter-American systems are anything to go by. This inevitably constitutionalises politics throughout the AU region. Writing in its early days, Oder expressed the firm belief that '[t]he African Court's judgments will have a wider impact, beyond the country against whom an application has been brought.'[137] The same view is shared by Oppong in relation to decisions of the African Commission, adding that domestic courts continue to rely on decisions of African regional bodies although 'there is no formal state-treaty mandated relationship between these African national courts and the international courts from which they are borrowing'.[138]

Similarly, Enabulele argues that a decision of the African Court on the incompatibility of domestic law, policy, practice or conduct with the African Charter stands on a relatively higher normative pedestal 'and is set on a wider range of application than a decision that simply finds a violation of the right of an individual.'[139] He correctly argues that such decisions carry implications for all the states over which the Court exercises jurisdiction, including those that are not signatories to the Court's Protocol but are

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[134] C Binder 'The prohibition of amnesties by the Inter-American Court of Human Rights' (2011) 12/5 *German Law Journal* 1214.
[135] E.g. *Heliodoro Portugal v Panama* IACtHR, (Ser C) no. 186 [2008] Preliminary objections, merits, reparations and costs, Judgment of 23 November 2008.
[136] C Binder (n 134 above) 1222–3. See also Helfer (n 50 above) 472.
[137] J Oder 'The African Court on Human and Peoples' Rights' order in respect of the situation in Libya: a watershed in the regional protection of human rights?' (2011) 11/2 *African Human Rights Law Journal* 506.
[138] RF Oppong 'Reimagining international law: an examination of recent trends in the reception of international law into national legal systems in Africa' (2007) 30/3 *Fordham Journal Law Journal* 318.
[139] AO Enabulele 'Incompatibility of national law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say?' (2016) 16/1 *African Human Rights Law Journal* 7.

nonetheless parties to the African Charter.[140] This is because the function of the African Court is not merely to determine the conflicting claims of the parties but also the development and maintenance of public order like its peers in the European and Inter-American systems.

Murray states that, like in the case of the European Court, the African judicial and quasi-judicial bodies should exhibit the willingness to examine a case that raises important constitutional questions, even where the petitioner desires to withdraw it.[141] Indeed, judgments of African regional human rights judicial and quasi-judicial bodies have an advisory character. On every occasion that these bodies decide cases, they are not just spelling out the rights and obligations of the parties that happen to be involved in that case, but they also develop the law. Naturally, the immediate and strongest impact of the decision will be felt in the respondent state. However, all states in the AU region must stay abreast of developments.[142]

If the African Court's case docket should involve legal disputes capable of general application, then this may allow it to develop rules and principles that would have application beyond the confines of the African region.[143] In this regard, the African Court has a wider potential contribution to make to human rights law, clarifying the substantive commitments incurred by states under regional treaties and general international law. For Mutua, the African Court must assert the *erga omnes* effect of its rulings and hear only those cases that have the potential to expound on the African Charter, and create jurisprudence that will guide African states in developing a legal and political culture in which respect for human rights is at the centre of the polity.[144]

In the view of this author, this will help the African Court to avoid a docket crisis similar to the one that is presently facing the European Court. In this regard, his argument proceeds, the Court should not be concerned with individual claims seeking to correct or punish a past wrong to an individual.[145] He reasons that the Court should be

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[140] Ibid.
[141] R Murray 'A comparison between the African and European Courts of Human Rights' (2001) 1/1 *African Human Rights Law Journal* 218.
[142] Compare JG *Merrills The development of international law by the European Court of Human Rights* (1993) 12.
[143] Murray (n 141 above) 218.
[144] M Mutua 'The African human rights court: a two-legged stool?' (1999) 21/2 *Human Rights Quarterly* 362.
[145] Ibid.

forward-looking and develop a corpus of law with precedential value and an interpretation of the substantive provisions of the African Charter and kindred universal human rights texts to guide and direct African states.[146]

According to Mutua, such forward-looking decisions would help to deter states from future conduct that is inimical to the African Charter by adjusting their behaviour.[147] In terms of this author's logic, individual justice would occur as a mere coincidence in the few cases that the Court would hear.[148] There is no doubt that Mutua's thinking is heavily influenced by scholarship on the European Court that suggests that the European Court should move away from individual justice towards constitutional justice, in which situation, it will deal with only a few cases involving structural and systemic violations of the Convention, thereby addressing its docket crises by reducing its caseload.[149]

While this approach could work with the European Court, it appears ill-suited to the African environment. This is because as against African states, the overwhelming majority of European states have made huge strides in establishing vibrant oversight mechanisms for human rights protection and the consolidation of democracy in their territories. In contrast, many African states still have weak, manipulable and dysfunctional judiciaries that are unable to provide redress for victims of human rights abuses. As a consequence, the citizens of many African countries look to the adjudicative organs of the African system as bastions of hope to achieve justice. If the door of the African Court is shut in their faces, where else will they look?

There is no doubt that a shift in jurisdiction by the African Court from individual justice to constitutional justice will plunge it into a legitimacy crisis of damaging proportions. The African Court's role and legitimacy in stemming the tide of human rights violations on the African continent remains firmly anchored in its ability, in each individual

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[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] L Wildhaber 'A constitutional future for the European Court of Human Rights?' (2002) 23/1 *Human Rights Law Journal* 164; L Wildhaber 'Changing ideas about the tasks of the ECtHR' in L Wildhaber (ed.) *The ECtHR 1998–2006: history, achievements, reform* (2006), 138–43, noting: 'the inexorable accumulation of. . . both inadmissible and substantial cases will increasingly asphyxiate the system so as to deprive the great majority of . . . cases . . . of any practical effect.'; L Wildhaber 'Rethinking the European Court of Human Rights' in J Christofferson & R Madsen (eds)*The European Court of human rights between law and politics* (2011) 224; P Mahoney 'An insider's view of the reform debate (how to maintain the effectiveness of the European Court of Human Rights)' (2004) 29 *Nederlands Tijdschrift voor de Mensenrechten-Bulletin* 1175.

petition, to provide adequate redress for human rights abuses where national remedies have been found to be non-existent or ineffective. It is inarguable that in determining individual claims, the Court will inevitably be called upon to develop general principles of human rights law which define the jurisprudential canon of the African regional human rights law.

In international law, 'settling disputes is not just about settling disputes.'[150] As Alvarez points out, institutionalised dispute mechanisms can be conceived as both conflict settlers as well as guardians of public values.[151] The policy function of an international court is indissociable from and certainly should not trump the continued emphasis on the provision of redress to individual victims of human rights abuses.[152] Individual petitions are a means by which gaps in the national human rights enforcement system are identified and by which the general normative standard in the respondent as well as the generality of member states is raised.[153]

It is important to note that individual justice and constitutional justice are not mutually opposed. International human rights courts and tribunals perform a range of functions at the same time. Their individual and constitutional review processes are reconcilable and legitimate functions.[154] In a nutshell, what is proposed by the present author is that the main focus of the African Court should be the delivery of individual justice, which is its *raison d'être,* while it keeps in mind its equally important function of formulating general jurisprudential canons underlying its decisions. In this way, the court strives at reconciling the truths of individual justice and collective justice. While expressing sympathy for Mutua's logic, it is an idea whose time has not yet arrived in Africa.

2.6 Squaring the admission of *amicus* briefs with bilateralism

It is submitted that the admission of *amici curiae* in international human rights litigation has the potential to break the bilateral mould of classical international litigation, making

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[150] ED Evans 'Foreword' in D *French et al International law and dispute settlement* (2010) viii.
[151] J Alvarez *International organisations as law-makers* (2006) 569.
[152] Compare, R Harmsen 'The European Court of Human Rights as a 'Constitutional court': definitional debates and the dynamics of reform' in J Morison *et al* (eds.) *Judges, transition and human rights* (2007) 36.
[153] P Mahoney 'New challenges for the European Court of Human Rights resulting from the expanded caseload and membership' (2003) 21/1 *Pennsylvania State International Law* 104.
[154] Bürli (n 111 above) 27.

it broad-based and inclusive, rather than technocratic and legalistic. In other words, the *amicus* device shifts the litigation process out of its traditional bipolar pattern into something that has greater procedural flexibility. The functional deficit associated with the international bilateralist model of litigation could be mitigated to some extent if international human rights tribunals sought and/or accepted the assistance of *amici curiae*. The function of these entities is to broaden judicial inquiry. Despite the fact that the bilateralist litigation approach was adequate to resolve disputes in the global legal order, it is no longer adequate given the cosmopolitan character of modern international law in which judicial proceedings often have repercussions felt beyond the parties to the dispute. Wiik shares this view and writes that *'[a]mici curiae* can soothe the imperfections of the bilateral structure of dispute settlement'[155]

Attempts by civil society to contribute 'outside' perspectives in the disposition of disputes are frustrated by the requirements of the bilateralist model of litigation which emphasises self-interest, and attaches enormous importance to individual initiative and the significance it places on the role of the disputing parties.[156] This model of litigation is dogmatic and correspondingly pays little regard to the interests of non-parties and the general public.[157] The participation of *amici curiae* is an exception to the rule, and where an *amicus* intervenor is admitted, stringent conditions are imposed on the admission to preserve party autonomy. What is needed instead is the structural adjustment of international litigation to accommodate divergent normative viewpoints in which the *amicus* device is used as a heuristic, participatory and constructive tool.[158]

If liberally afforded access, the *amicus curiae* can serve as an agent of 'inclusive pluralism which recognises a diversity of views regarding the public interest and the impact of legal decisions on the public.'[159] This is because the rights and interests that *amici curiae* normally seek to vindicate are relatively abstract, intangible, collective

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[155] Wiik (n 4 above) 44.
[156] L Re 'The *amicus curiae* brief: access to the courts for public interest associations' (1984) 14/3 *Melbourne University Law Review* 522. See also EE Sward 'Values, ideology, and the evolution of the adversary system' (1989) 64/2 *Indiana Law Journal* 310 – 311.
[157] N Daly '*Amicus curiae* and the public interest: a search for a standard' (1990) 12/4 *Law and Policy* 389. See also C Harlow & R Rawlings *Law and administration* (1997) 551.
[158] Daly, Ibid. 391.
[159] Ibid. 389. See also M Schachter *The utility of* pro bono *representation of US-based amicus curiae in non-US and multi-national courts as a means of advancing the public interest* (2004) 28/1 *Fordham International law Journal* 143–44; C Murray 'Litigating in the public interest: intervention and the *amicus curiae*' (1994) 10/2 *South African Journal on Human Rights* 240.

and ideological or public in outlook.[160] In addition, the *amicus* intervenor has some wiggle room in court to put across factual and legal perspectives which parties to the dispute do not enjoy the liberty to do. This is because lawyers as officers of the court, owe the court an ethical duty not to burden it with materials that do not bear directly on the disposal of the case and must also display maximum candour in their relations with the court at all times. On the other hand, an *amicus* is generally not limited as to the issues it can raise since it participates in the proceedings on the basis of public interest.[161]

More than intervention in a quest to protect personal rights or interests, *amicus* participation betokens the radical transformation of international litigation from a bilateral process to a public one.[162] It has been argued that the *amicus* device is vital 'in the gradual but perceptible evolution of international law from a system of multiple sets of *inter partes* arrangements to a comprehensive, multi-layered legal order.'[163] It has been argued *amicus* submissions in the context of international litigation provide an opportunity to address questions of general policy rather to be rigidly confined to 'assessing the merits of the specific dispute,' which is typically the province of the parties.[164]

The intervention by groups as friends of the court marks an important shift away from the individual values that gained prominence in the nineteenth century towards an emphasis on the collective or diffuse interests of the community and the welfare of the public.[165] The shift from bilateralism to multilateralism or communitarianism in litigation signifies that international courts and tribunals, as organs of the international

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[160] C Tobias 'Standing to intervene' (1991) 3 *Wisconsin Law Review* 419; GA Caldeira & JR Wright 'Organized interests and agenda-setting in the US Supreme Court' (1988) 82/4 *American Political Science Review* 1112. K O'Connor & L Epstein '*Amicus* participation in the US Supreme Court litigation: an appraisal of the Hakman's folklore' (1981-82) 16/2 *Law and Society Review* 314. A van Aaken 'Making international human rights protection more effective: a rational choice approach to the effectiveness of provisions for *ius standi* provisions' (2006) 23/1 *Conference on New Political Economy* 38.

[161] R Garcia 'A democratic theory of *amicus* advocacy' (2008) 35/2 *Florida State University Law Review* 319.

[162] Y Ronen & Y Naggan 'Third parties' in CPR Romano *et al* (eds) *The Oxford handbook of international adjudication* (2015) 822. See also K Wellens 'The International Court of Justice, back to the future: keeping the dream alive' in K Wellens (ed.) *International Law in silver perspective: challenges ahead* (2015) 187 – 188.

[163] Ronen & Naggan (n 162 above) 826.

[164] DM Gruner 'Accounting for the public interest in international arbitration: the need for procedural and structural reform' (2003) 41/3 *Columbia Journal of Transnational Law* 938.

[165] Re (n 156 above) 522.

community, are charged principally with the duty to protect the community's core values and interest.[166] Indeed, it is admitted that the principal mandate of international courts is to settle disputes between parties, but they cannot do so without regard to public interest. It is with this understanding that Judge Pinto de Albuquerque remarked in *Fabris v France*,[167] that 'the … underlying general interest justified the introduction of the concept … of third-party intervention.'[168] It is in this context that it has been suggested that '[t]he *amicus* device complements the voluntarist and bilateral origins of international law with public interest based normative structures.'[169]

However, the international litigation model needs not to only take into account the bilateral relationships between states but also to pay attention to the values and interests of the international community as a whole.[170] This becomes more relevant to the African human rights system because the African Charter protects 'peoples's rights', a concept that is closely associated with collective rights.[171] This instrument shifts the traditional paradigm of human rights theory from individualism to communitarianism through an extensive affirmation of peoples' rights.

According to Ouguergouz, 'through its emphatic enshrinement of the rights of peoples, the African Charter can be seen as a revolutionary legal instrument.'[172] Indeed, the African Commission repeated these sentiments in *Centre for Minority Rights Development & Anor v Kenya* (the *Endorois* case),[173] when it said that 'the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of peoples.'[174] The shift from bilateralism to an inclusive litigation system reflects that the circle of international law is widening to include individuals and NGOs in addition to states.

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[166] Simma (n 3 above) 221.
[167] Application no. 16574/08, [2007] 45 EHRR 295, (Grand Chamber), Judgment of 7 February 2013.
[168] Ibid. para 10.
[169] Benzing (n 47 above) 371. See also Wiik (n 4 above) 47.
[170] Von Bogdandy & Venzke (n 43 above) 64.
[171] Report of the Rapporteur of the OAU ministerial meeting on the draft African Charter on Human and Peoples Rights held in Banjul, The Gambia, from 9 - 15 June 1980 (CAB/LEG/67/3/Draft Rapt. Rpt (II)), 4 (accessed 03 August 2018).
[172] F Ouguergouz *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 372.
[173] Communication no. 276/2003.
[174] Ibid. para 149.

Abi-Saab states that '[t]he question of *amicus curiae* relates to the multiplication and greater activism of new international actors and how they can find their way into the international legal system.'[175] Consequently, international legal processes must take into consideration the interests of these additional members of the international legal family. It is in this context that Kooijmans has remarked that:

> Gone are the days when international litigation was invariably either inter-State dispute settlement or commercial arbitration with a sparse mixture of the two in [the] case of State contracts. The post-World War II mechanisms give access to a great variety of non-state actors, be it individuals, corporations, business firms, minorities and indigenous peoples, non-governmental organizations and inter-governmental organizations.[176]

In fact, throughout its history, the *amicus* device has been used as an inherently flexible judicial instrument to overcome the shortcomings of its common law adversarial litigation process.[177] It is owing to its flexibility and organic nature that this institution has been used as a critical 'tool to surpass the limitations placed on the court by an adversarial system.'[178] The emergence of *amici curiae* in international litigation bears the potential to disrupt, but also to reconceptualise, the traditional litigation dynamic.

The resulting change is part of what has been broadly described as a shift from a private view towards a more public or constitutional concept of international law, from sovereignty towards community.[179] In *Order concerning the Declaration of Intervention by New Zealand in the Whaling* case,[180] Judge Cançado Trindade states in his Separate Opinion that:

> Intervention in legal proceedings, by providing additional elements to the Court for its consideration and reasoning, can contribute to the progressive development of international

[175] G Abi-Saab 'Whither the judicial function? concluding remarks' in LB de Chazournes *et al* (eds) *International organizations and international dispute settlement* (2002) 245.
[176] PH Kooijmans 'The role of non-state actors and international dispute settlement' – WP Heere (ed*.) From government to governance* (2001) 21.
[177] MK Lowman 'The litigating *amicus curiae*: When does the party begin after the friends leave?' (1992) 41/4 *The American University Law Review* 1247.
[178] Ibid.
[179] R Collins *The institutional problem in modern international law* (2016) 196.
[180]Judge Cançado Trindade, Separate Opinion, *Whaling in the Antarctic* (*Australia v Japan: New Zealand intervening*), ICJ GL No 148, Order of 6 February 2013.

> law itself, especially when matters of collective or common interest and collective guarantee are at stake.[181]

Similarly, writers are broadly agreed that the *amicus* procedure offers an important opportunity – indeed, often the only opportunity – for non-parties to participate in judicial proceedings that have implications for community interests.[182] *Amicus* intervenors apprise the tribunal of the broad-based social, economic and legal implications of an anticipated case outcome.[183] Comparato contends that the two most important sources of information vital for judicial decision-making are information received from the record parties and information obtained from *amici curiae*.[184] As seen earlier, the involvement of *amici curiae* in international litigation represents a critical shift, from the adversarial justice system to a more inclusive and outward-looking justice system.[185] In this connection, Barker notes:

> This device represents the prime departure from the traditional adversary system of justice. No longer is the system characterized by its triangular-like structure with the contesting parties at the base and the court at the apex. If anything, the structure would more accurately be described as "multi-sided" since through the *amicus* technique, many more than just the immediate adversaries enter the judicial forum.[186]

The admission of the disparate perspectives of non-parties to be heard in a case goes to show that the understanding of judicial decisions as acts that are binding only *inter partes* is woefully inadequate in human rights litigation. This is because human rights claims concern society as a collective and direct stakeholder.[187] Decisions of courts are therefore social artefacts, with a bearing on society at large. It has often been

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[181] Ibid. para 76.
[182] FM Covey Jr '*Amicus curiae*: friend of the court' (1959) 9/1 *DePaul Law Review* 34. See also E Angell 'The *amicus curiae* American development of English institutions' (1967) 16/4 *The International and Comparative Law Quarterly* 1017 – 1018.
[183] K Lasson '*amicus* briefs' in A Levy & PM Sandler (eds) *Amicus Briefs in Appellate Practice for the Maryland Lawyer - State and Federal* (2007) 401; A Parlee 'Primer on *amicus curiae* briefs' (1989) 62 *Wisconsin Law Review* 14; B Stern 'The future of international investment law: a balance between the protection of investors and the states' capacity to regulate' in J Alvarez *et al* (eds) *The evolving international investment regime: expectations, realties, options* (2011) 188.
[184] S Comparato *Amici curiae and strategic behaviour in state supreme courts* (2003) 40.
[185] See BJ Gorod 'The adversarial myth: appellate court extra-record factfinding' (2011) 61/1 *Duke Law Journal* 37.
[186] LJ Barker 'Third parties in litigation: a systemic view of judicial function' (1967) 29/1 *The Journal of Politics* 52. See also Kochevar (n 75 above) 1656.
[187] A Zimmermann 'International courts and tribunals, intervention in proceedings' in R Wolfrum (eds) *Max Planck Encyclopedia of Public International Law* (2009) 1011.

contended that what may *ex facie* appear to be individual interests in a claim actually mask an underlying community value.[188]

But most importantly, it is not only direct parties to the suit that may desire to participate in litigation to enforce human rights norms, but members of the public likely to be affected by the expected court decision as well. In a nutshell, the adversarial approach is extremely individualistic, promotes an atomistic concept of justice, incapable of accommodating the legitimate and expansive claims and demands of the collective, and is seemingly impervious to change. Shelton notes that:

> The amount of litigation has steadily increased in all international courts. Human rights cases, in particular, are growing in number and being litigated in all tribunals, not only those established specifically for that purpose. In addition, new issues of widespread concern, such as environmental cases, are being presented for decision. In this litigation framework, issues of broad public interest can and do arise apart from the questions submitted to courts by the parties or by international institutions. Rarely is international litigation a matter of private concern or interest affecting only the parties.[189]

Seen in this light, the admission of *amicus curiae* mitigates the rigours of bipolarism and stresses the 'publicness' of international law by asserting that contemporary international litigation is supposed to regulate and advance interests that lie beyond those of the parties to the suit.'[190] The concept of 'publicness' has do to with a change in the manner in which the law and its systems are perceived by the public.[191]

Thus, Waldron argues that the public character of law is to be discerned from the fact that the law presents itself not just as a set of rules formulated by the elites, but as a set of norms publicly given in the name of the public, so that ordinary people can claim it as their own.[192] In essence, what this study calls for is a non-hegemonic participation

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[188] Villalpando (n 103 above) 416.
[189] Shelton (n 51 above) 614.
[190] B Kingsbury & M Donaldson 'From Bilateralism to Publicness in International Law. in: from bilateralism to community interest: essays in honour of Judge Bruno Simma' (2011) 83. See also B Kingsbury 'International law as inter-public law in H Richardson & M Williams (eds.) *Moral Universalism and Pluralism* (2009) 167.
[191] J Waldron 'Can there be a democratic jurisprudence?' (2009) 58/3 *Emory Law Journal* 675. Waldron also emphasises that 'laws must purport to stand in the name of the whole society, and address matters of concern to the society as such, rather than just matters of personal or specific concern to individuals or groups who formulate the laws.'
[192] Ibid.

of private interests in the litigation process. This school of thought draws its essence from the ideal of collective deliberation postulated by transjudicialism theories and on the deep-seated uneasiness arising from the ICJ's reticence towards the admission of private intervenors.[193]

2.7 Implications of *amicus* interventions for the positivist voluntarist international legal order.

The ever-increasing presesence of civil society in the international legal order is testimony to the fact that non-state actors are going to become vital counterparts to the community of states, which have dominated the international scene for decades.[194] It is becoming evident that international relations 'are increasingly shaped not only by the states themselves, but also by an expanding array of non-State actors on the international scene.'[195] It is argued, therefore, that the participation of *amicus curiae* in international litigation directly correlates with an enhanced international legal status of the individual and the individual's role in the creation and development of international law and policy.

The increasing acknowledgment of individuals as subjects of international law raises questions about whether or not their position in international law can be strengthened by affording them the opportunity to articulate their views before international courts and tribunals.[196] Indeed, some writers have argued that the participation of NGOs and other organised interests in international law has found an unmistakable manifestation in the active use of *amicus* briefs in international litigation.[197] According to Shelton:

> International courts are developing innovative practices to take broader public concerns into consideration. One positive development is the acceptance of *amicus* participation by non-

[193] Hermida (n 63 above) 490.
[194] U Beyerlin 'The role of NGOs in international environmental litigation' (2001) 61 *Zeitschrift fuer Auslaendisches Oeffentliches Recht und Voelkerrecht* 357.
[195] B Botrous-Ghali quoted in K Nowrot 'Legal consequences of globalization: the status of Non-Governmental Organizations under international law' (1999) 6/2 *Indiana Journal of Global Legal Studies* 579.
[196] B Hess & A Wiik 'Affected individuals in proceedings before the ICJ, the ITLOS and the ECHR' in HP Hestermeyer *et al Coexistence, cooperation and solidarity* (2012) 1639.
[197] S Ohlhoff & H Schloemann 'Transcending the nation-state? Private parties and the enforcement of international trade law' (2001) 5 *Max Planck United Nations Yearbook* 678. See also D Juma 'Lost (and found) in transition? The anatomy of the new African Court of Justice and Human Rights (2009) 13 *Max Planck United Nations Yearbook* 295.

> governmental organizations in international cases, a manifestation of the growing role of non-state actors in international law generally.[198]

Arguing along the same lines, Hollis notes that 'the participation by private actors as *amici* in international dispute settlement is consistent with the practice of private actor participation in [international litigation in particular] and international law generally…'[199] While the involvement of these entities, especially NGOs, in norm-setting and policy development is not a new phenomenon, their role and influence has steadily increased. This is especially true in the areas of human rights and environmental law, which have received the greatest number of *amicus curiae* submissions.[200]

As is the case with all non-state actors, the involvement of *amici curiae* in international litigation signals a shift in the concept of international law itself away from the Hegelian and neo-Hegelian understandings. These concepts posit that the state is prior to the individual, and that it is the solemn and the final repository of the aggregate of the freedoms and responsibilities of the individuals who constitute it.[201] The rise of *amici curiae* in the international legal order does not fit the *état providence* paradigm.[202] As Eckersley forcefully argues, the involvement of *amicus* entities before multilateral adjudicative bodies serves to 'loosen the view that only states are the legitimate authors, addressees and interpreters of international … law.'[203]

Calliess and Renner relevantly point out that the *amicus* mechanism allows intervenors to 'find ways to voice their concerns in the very places where law beyond the state is made.'[204] The overall consequence of the participation of non-state actors in the international legal system is arguably clear: 'they are de-hierarching and flattening the existing international structures of government and their consequent

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[198] Shelton (n 51 above) 616.
[199] DB Hollis 'Private actors in Public International Law: *amicus curiae* and the case for the retention of state sovereignty' (2002) 25/2 *Boston College International and Comparative Law Review* 243.
[200] T Ishikawa 'Third party participation in investment treaty arbitration' (2010) 59/2 *International and Comparative Law Quarterly* 389.
[201] W Friedmann *The changing structure of international law* (964) 247. The Hegelian view holds that states are the 'higher authority, in regard to which the laws and interests of the family and community are subject and dependent.' See AW Wood (ed.) Hegel: *Elements of the philosophy of right* (1991) para 261.
[202] F El-Hosseny *Civil Society in investment treaty arbitration: status and prospects* (2018) 7.
[203] R Eckersley 'A green public sphere in the WTO?: the *amicus curiae* interventions in the transatlantic biotech dispute' (2007)13/3 *European Journal of International Relations* 331.
[204] G-P Calliess & M Renner 'The Public and the private dimensions of transnational commercial law' (2009) 10/10 *German Law Journal* 1341.

juridical arrangements.'[205] To buttress the status of the individual in the modern international legal order, many if not all international judicial bodies allow individuals, organisations and groups to participate in their litigation as *amicus curiae*.

Human rights courts are the poster children for this practice. Although this procedure does not amount to the ability to espouse an international claim, it offers significant possibilities to mitigate the rigours of statism and the associated bilateralism and therefore influences the development of international law as a self-conscious legal system. Today, the general attitude of most courts is that in cases dealing with questions of important public interest, leave is usually granted to non-parties to file *amicus* briefs unless there are weighty countervailing considerations.

After examining the role that NGOs play before international courts and compliance bodies, Lindblom reports that states are increasingly institutionalising the involvement of organised interests in international decision-making.[206] These developments are born out of the realisation that legal positivism, which promotes bilateralism and state voluntarism and insists on locking out non-state actors from the operations of international law, is unworkable. Mohamed strenuously argues in the context of the African Court that this body 'would have to come to terms with the fact that adherence to the statist paradigm of international law would do a lot of harm to its adjudication of human rights.'[207] This author expressed the opinion further that '…that paradigm no longer occupies a place of honour under international human rights law.'[208] This writer concluded that if the Court does not permit the participation of individuals, NGOs and groups, it might be guilty of sticking to a dated conception of human rights adjudication.[209]

The old Roman law maxim *hominum causa omne jus consitutum est* (all law is made for the benefit of mankind, and not vice versa) is gaining credence on the international

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[205] NH Ben-Ari *The normative position of International nongovernmental organisations under international law* (2012) 70.
[206] A-K Lindblom *Non-Governmental Organisations in International Law* (2005) 218.
[207] AA Mohamed 'Individual and NGO participation in human rights litigation before the African Court of Human and Peoples' Rights: lessons from the European and inter-American courts of human rights' (1999) 43/2 *Journal of African Law* 212.
[208] Ibid.
[209] Ibid. 212 – 213.

plane.[210] However, some writers have decried the fact that the participation of *amici curiae* in international fora undermines state sovereignty, which, as is well known, has served as the central tenet of international law since the conclusion of the treaties of Westphalia.[211] Contrarily, Hollis argues that it is inaccurate to consider *amicus* involvement in international litigation as supplanting or eroding 'state sovereignty in some zero-sum game paradigm,' remarking instead that 'this can be seen as affirming sovereignty's continuing vitality.'[212] According to this author, this is because both law-making authorities of international law and the incidence of private actor participation occurred in the first place, and subsist to this day, with the consent of states.[213]

For Kamminga, the fears about the impact of private actor participation on the sovereignty of states are exaggerated since the formal status of NGOs and other organised private interests in international law is still weak.[214] Notwithstanding these concerns, the involvement of non-state actors as *amici curiae* in international litigation underlines the on-going transformation of the entire international legal order from being a silo of states to a cosmopolitan scene with a place for the individual who in the past decades has 'evolved from an illegitimate child to a well-accepted family member of international law.'[215]

Although states and, to a comparatively lesser extent, their agencies such as multilateral organisations create, implement and enforce international law, civil society plays a critical role in that process as well.[216] Considering the activities of non-state actors, particularly NGOs, one is able to find credible evidence of some influence both in the development and application of international law, albeit one that is lesser than that of states and inter-governmental organisations.[217] They achieve this in part through the submission of *amicus* briefs before international adjudicative bodies.

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[210] Von Bogdandy & Venzke (n 115 above) 73; *Prosecutor v Dusco Tadić*, Case no. IT-94-1-AR72, para 97. See also R Domingo 'Gaius, Vattel, and the new global law paradigm' (2011) 22/3 *The European Journal of International Law* 631.
[211] See JR Bolton 'Should we take global governance seriously*?'* (2000) 1/2 *Chicago Journal of International Law* 217.
[212] Hollis (n 199 above) 237.
[213] Ibid.
[214] MT Kamminga 'The evolving status of NGOs under international law: a threat to the inter-state system?' in G Kreijen *et al* (eds) *State, sovereignty and international governance* (2002) 404.
[215] AT Muller 'Book review: The individual in the international legal system by Kate Parlett' (2012) 23/1 *European Journal of International Law* 299; See also Steiner (n 98 above) 15.
[216] Hollis (n 199 above) 243.
[217] Ibid.

As stated earlier, the doctrinal basis for this development can best be explained through the attenuated emphasis on state sovereignty and the greater recognition and acknowledgment of individuals and civil society as rights bearers and subjects of international law.[218] Overall, the role of the *amicus* participation in the African human rights system must thus be seen in the broader context of the growing participation of private actors in international law.

2.8 Interim conclusion

In this chapter it has been suggested that the submission of *amicus* briefs constitutes a departure from the orthodox matrix of bilateral and adversarial litigation. This conventional approach, which has enduringly dominated international litigation and continues to inform the approach of most international courts and tribunals in their adjudicative tasks, is anachronistic and outmoded. It limits the possibility of third party intervention and thus circumscribes the frontiers of truth in litigation. There is an intrinsic contradiction between the purpose of truth seeking on the one hand and the exclusion of other potential sources of relevant truth, beside record parties, on the other.

In particular, the bilateral model of litigation is inappropriate for international human rights law litigation, which seldom fits into a bilateral legal setting, particularly given the public interest character of human rights disputes.[219] To position collective interests in a bilateralist litigation process would be akin to putting a square peg in a round hole. Today, it is widely acknowledged that decisions of international courts and tribunals not only affect the direct parties to the suit and their immediate interests but also increasingly the rights and obligations of third parties. As such, justice demands that NGOs representing the public interest be afforded an opportunity to offer information and arguments to these bodies.

It is therefore inarguable that the bilateralist model of international litigation should be re-conceptualised in order to give effect to this commitment.[220] As argued throughout the chapter, the retreat of bilateralism or adversarialism can be achieved in part by

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[218] Ibid.
[219] A von Bogdandy & I Venzke 'In whose name? an investigation of international courts' public authority and its democratic justification' (2012) 23/1 *European Journal of International Law* 7.
[220] JH Knox 'A new approach to compliance with international environmental law: the submissions procedure of the NAFTA Environmental Commission' (2001) 28/1 *Ecology Law Quarterly* 1.

adopting a more flexible stance towards the admission of *amicus curiae* in international judicial decision-making processes. This will undoubtedly go a long way towards reconceptualising and reconfiguring international litigation from a bilateral enterprise to a multi-party process that accommodates public interest.

The chapter has also stressed that the participation of *amici curiae* in international judicial proceedings is emblematic of the growing role of non-state actors in the field of international law. This development reflects an expanding range of private entities, in particular NGOs and individuals.[221] Individuals may presently not be participating in the international legal order to the same extent as states, but the trend is unmistakably clear: the role of individuals in the international legal system is rapidly expanding, often against the will and wishes of states.[222] Indeed, Former Justice Buergenthal is correct when he remarks that:

> The acceptance of the notion that individuals have rights enforceable on the international plane without the intervention of their state of nationality [has] played havoc with certain basic international law principles and assumptions. A legal system developed over centuries to regulate relations between states must make considerable conceptual adjustments to accommodate the extension of its normative reach to individuals.[223]

As Friedmann notes, the heyday of the statist paradigm and bilateral system of international law is slowly receding into the horizon.[224] The new *jus gentium* is gradually liberating itself from the shackles of statism. The palpably neat and bright lines of the bilateral system are blurring: the circle of international actors is gradually expanding and the juridical distinction between direct parties and intervening non-parties is becoming less significant.[225] More critically, the participation of *amici curiae* in international litigation firms up the position of the individual as an actor in the international legal order which has become an irreversible reality.

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[221] Ronen & Naggan (n 162 above) 826.
[222] R McCorquodale 'The individual and the International Legal System' in MD Evans (ed.) *International Law* 301.
[223] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (articles 13 and 29 American Convention on Human Rights*, Advisory Opinion, OC-5/85, IACtHR, (Ser. A) no. 5 [1985] 20, Opinion of 13 November 1985.
[224] Friedmann (n 201 above) 10.
[225] Y Ronen 'Functions and access' in WA Schabas & S Murphy (eds) *Research Handbook on International Courts and Tribunals* (2017) 483.

CHAPTER 3

AMICI CURIAE PARTICIPATION BEFORE SELECT PEER JURISDICTIONS

3.1 Introduction

This chapter provides an overview of *amicus* participation before select peer international courts and tribunals, and does so without any pretence of comprehensiveness. These courts and tribunals include the ICJ, the International Tribunal for the Law of the Sea (ITLOS), international criminal courts and tribunals, WTO tribunals and investment dispute settlement bodies as well as counterpart regional human rights courts. These mechanisms are dealt with principally on the basis of their varying approaches to *amicus* participation. For instance, while the ICJ and ITLOS are obstinately reticent towards *amicus* intervention, international criminal and regional human rights mechanisms have adopted a flexible approach towards the admission of *amici curiae*.

Although the present study is not comparative *per se*, it is important to reflect on the *amicus* practices, experiences, insights and lessons drawn from other international courts and tribunals. This approach helps to give a clearer and better picture of the *amicus* practice in international judicial decision making, as opposed to a monochromatic approach that focuses solely on the African regional system and denies the study an eclectic outlook. Despite the fact that the *amicus curiae* has its roots in domestic law, it is now deeply interlaced into the fabric of modern international judicial practice.[1]

Since the late 1990s, a notable increase in the acceptance of *amicus* briefs has been evident across international judicial and quasi-judicial bodies.[2] This trend has been variously described as 'one of the most important evolutions weathered by

[1] Y Ronen 'Functions and access' in WA Schabas & S Murphy (eds) *Research Handbook on International Courts and Tribunals* (2017) 478; See also S Cotton-Betteridge 'An emerging international norm for Non-Governmental Organizations' 2015 11/2 *Brigham Young University International Law & Management Review* 6.

[2] A Kent & J Trinidad 'International law scholars as *amici curiae*: an emerging dialogue (of the deaf)? (2016) 29/1 *Leiden Journal of International Law* 1086; S Schadendorf 'Investor-state arbitrations and human rights of the host's state's population: an empirical approach to the impact of *amicus curiae* submissions' in N Weiß & J-M Thouvenin *The influence of human rights in international law* (2015) 168.

international law in recent decades,'[3] and a 'golden age of civil society participation' in international litigation.[4] In fact, it has been said that 'procedures allowing NGO *amicus curiae* briefs are currently more a norm than an exception in international judicial proceedings'.[5] The booming of NGO participation in international litigation has led one writer to remark that 'maybe there is an emergence of a customary international rule which allows for the submissions of *amicus curiae* briefs.'[6]

To fully understand the phenomenon of *amicus* activity in international law, it is important to understand its domestic development and its ultimate migration into the international legal system. It has been pointed out that the migration of legal concepts and principles between domestic, regional and international legal orders has been a critical factor in the progressive development of international law.[7]

3.2 Domestic origins of *amicus curiae*

A historical account of the *amicus curiae* is useful as the '"blocking in" of historical material will add contextual depth and analysis, and this will subserve and feed into the generation of theoretical ideas about the contemporary situation.'[8] The notion of an *amicus curiae* is not new to the world of law or jurisprudence.[9] Like many practices of the age of antiquity, the roots of the *amicus curiae* are contested among writers.[10] There is a community of legal writers which believes that the *amicus curiae* originates in Roman law, while other writers contend that the *amicus curiae* is a common law creature. We turn to discuss these accounts and the subsequent spread of the *amicus*

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[3] E De Brabandere NGOs and the "public interest": the legality and rationale of *amicus curiae* interventions in international economic and investment disputes' (2011) 12/1 *Chicago Journal of International Law* 112.

[4] IT Odumosu 'The law and politics of engaging resistance in investment dispute settlement' (2008) 26/2 *Pennsylvania State* International *Law Review* 264.

[5] A Dolidze 'The Arctic Sunrise and NGOs in international judicial proceedings (2014) 18/1 American Society of International Law Insights.
Available at: https://www.asil.org/insights/volume/18/issue/1/arctic-sunrise-and-ngos-international-judicial-proceedings (accessed 28 January 2018.

[6] L B de Chazourne 'Transparency and Amicus Curiae Briefs' (2004) 5/2 *The Journal of World Investment and Trade* 334.

[7] P Sands 'Treaty, custom and the cross-fertilisation of international law' (1998) 1/1 *Yale Human Rights and Development Law Journal* 89-91.

[8] D Layder *New strategies in social research* (1993) 118.

[9] SP Subedi 'The WTO Dispute Settlement Mechanism as a new technique for settling disputes in international law' in D French *et al* (eds) *International law and dispute settlement* (2010) 183.

[10] N Bürli *Third party intervention before the European Court of Human Rights* (2017) 19.

device to other domestic jurisdictions as well as its migration to the international legal system.

3.2.1 Roman law traditions

Some writers believe that the *amicus curiae* owes its origins to ancient classical Roman Law which empowered a judge to appoint a *consilium magistratum* or simply a *consilium* (an officer of the court) or a group of independent experts comprising of eminent jurists and priests selected by the judge to assist the court with non-binding opinions when doubtful or mistaken about a question of law.[11] The judge, often appointed from the dominant upper class of the Roman Republic, did not need to have a legal background or training.[12] Despite this, he was expected to know the law and apply it to cases. He therefore could, at his discretion, seek assistance from the *consilium* to complement the submissions of the parties.[13] Throughout the life of the Roman Empire, this procedure was formalized, and in the late Empire, each official performing adjudicatory functions was supported by a salaried *advesor*.[14]

The *consilium magistratum* influenced the establishment of the advisory council for the emperors called the *consilium principis* by Emperor Augustus.[15] The members of the *consilium principis* were at times referred to as the *amici principis*, a concept that is believed to have had etymological and conceptual influence on the development of the modern day *amicus curiae*.[16] The term *amicus* was also used in official documents as a designation for public officials such as procurators and provincial governors to signify the esteem attached to their offices as representatives of the emperor.[17] Literature subscribing to this genealogy takes the view that the *amicus* practice was subsequently introduced into the common law as a legal transplant.[18]

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[11] For instance, see A Lucas 'Friends of the court? the ethics of *amicus* brief writing in first amendment litigation' (1998) 26/5 *Fordham Urban Law Journal* 1607. See also L Pfeffer '*Amici* in church-state litigation' (1981) 44/2 *Law and Contemporary Problems* 83.

[12] A Wiik *Amicus curiae participation before international courts and tribunals* (2018) 76. Citing O Tellegen-Couperus 'The so called Consilium of the praetor and the development of Roman law' (2001) 69 *Tijdschrift voor Rechtsgeschiedenis* 11.

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] For instance, see F Pommersheim '*Amicus* briefs in Indian law: the case of Plains Commerce Bank v Long Family Land & Cattle Co' (2011) 56 *South Dakota Law Review* 87.

The endurance of the *amicus* from the early Roman times in the fourteenth century to the present day, without falling obsolete like many Roman law concepts, can be attributed in part to its flexibility, which has allowed it to adapt and remain responsive to the ever-changing conditions of the universe of litigation. As Lowman points out, 'the history of the *amicus* device hinges on a single principle: flexibility'.[19] It is also on account of its original characteristics of dynamism, versatility, flexibility, and adaptability that it found root in the international field, where it was previously unknown, and its use is increasing steadily.

3.2.2 Common law traditions

Some writers find fault lines in the above historical account that traces the *amicus* institution to Roman Law and claim that the *amicus curiae* is a creature of the English Common Law.[20] For instance, Covey disputes the Roman law lineage of *amicus curiae* on at least two grounds: first, he argues that the *consilium* could not appear before the court on its own initiative, as the *amicus curiae* does today, but could act only at the special behest of the court.[21] Second, he points out that when requested by the court, the *consilium* could prosecute a criminal defendant, while an *amicus* cannot act against a criminal defendant.[22] According to him, '[t]hese differences raise a serious doubt to the contention that the *amicus* practice is merely an off-shoot of the Roman *consilium* practice.'[23]

Covey also reminds us that from the Early Common Law to the Middle Middle Common Law ages, persons facing serious criminal charges, such as treason or felony against the Crown, were denied the benefit of legal representatives.[24] This notwithstanding, such criminal defendants were accorded protection from any errors of law, and unless

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[19] MK Lowman 'The litigating *amicus curiae*: when does the party begin after the friends leave?' (1992) 41/4 *The American University Law Review* 1247. In this regard, Krislov writes that '[t]he *amicus curiae* brief represents a prime example of a legal institution evolving and developing while maintaining superficial identity with the past. It has been a catch-all device for living with some the difficulties presented by the common law system of adversary proceeding.' See S Krislov 'The *amicus curiae* brief: From friendship to advocacy' (1963) 72/3 *Yale Law Journal* 720.

[20] L Epstein 'A comparative analysis of the evolution, rules and usage of *amicus curiae* briefs in the US Supreme Court and in states courts of last resort' (1989) 3. A paper prepared for delivery at the 1989 meeting of the Southwest Political Science Association, Little Rock, Arkansas. Available at: http://epstein.wustl.edu/research/conferencepapers.1989SWPSA.pdf (accessed 12 August 2016).

[21] FM Covey Jr '*Amicus curiae*: friend of the court' (1959) 9/1 *DePaul Law Review* 34.

[22] Ibid.

[23] Ibid.

[24] Ibid.

they were a lawyer themselves, they would be unable to properly advise themselves about such errors of law. It is thus probable, so the argument proceeds, that the *amicus* practice, or at least a facet of it, emerged to fill this gap.[25] Since an error of the law would be beyond the notice of the court (for if it were within its notice, it could remedy it itself), the *amicus curiae* could not lie supine to be asked for his advice like the *consilium*, but should be able to offer it to the court unsolicited.[26]

Covey argues that the common law practice of allowing any person present in the courtroom to come up front as an *amicus curiae* to provide the court with legal information that was beyond it is 'as old as the reported cases themselves.'[27] He points out that Year Book cases dating as far back as 1353 contain evidence of *amicus* interventions as an accepted practice.[28] Although Covey makes the claim that his theory finds some justification in the works of early writers, he does not cite any such writer to support that claim. Neither has diligent research by the present author yielded any writings that support Covey's theory, making it open to doubt.

The fact that the present-day *amicus curiae* is substantially and functionally different from the Roman *consilium* does not preclude the possibility that the *consilium* practice has transmogrified over time to become the *amicus curiae* as we know it today. In other words, it is possible that the present *amicus curiae* could be an evolutionary upshot of the Roman *consilium* that was later introduced into the Common Law. Although it is unclear as to when the English courts began to admit *amicus* briefs, Krislov states that the participation of *amicus curiae* in public law started to appear in English law reports in the seventeenth and eighteenth centuries.[29]

As at Roman law, *amici* did not need to have a background in law to intervene in common law courts, and their general attitude was to embrace such interventions since 'it is for the honour of a court of justice to avoid error.'[30] The functions of *amici curiae* at common law included, 'instructing, warning, informing, and moving the court.'[31] In one interesting case, one Sir George Treby, who was in court during the hearing of a case, stood to inform the court that he was present in parliament when a

[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Krislov (n 19 above) 695.
[30] Ibid. 694.
[31] Ibid.

statute whose meaning was in contest was passed, and as *amicus curiae*, offered to inform the court as to the intent of parliament when it passed the legislation in question.[32]

3.2.3 American legal system

While it is broadly accepted that the roots of the *amicus curiae* are traceable to Roman law, the institution was developed before the English courts and reached full flower before the Courts of the US.[33] According to Covey, by historical serendipity, 'the *amicus* practice crossed the Atlantic with the first lawyer to bring his Coke's *Institutes*.'[34] Other writers argue that it is the pervasive influence of the common law in the American legal system that led to the transposition of the *amicus* concept into the jurisprudence of the US.[35] However, it was not until 1932 in *Greed v Biddle*[36] that the Supreme Court of the US finally allowed the intervention of an *amicus curiae* in its litigation.[37] The first NGO to appear in an *amicus* capacity in the litigation of the US Supreme Court was the Chinese Charitable and Benevolent Association of New York in the 1904 case of *Ah How (alias Louie Ah How) v US*.[38]

Rule 37 of the Supreme Court Rules requires organisations and individuals who desire to file *amicus* briefs to seek the consent of the parties to the suit (save for the federal government and respective states, who are exempted from seeking consent).[39] In practice, the vast majority of litigants before the Supreme Court file a 'blanket consent', and leave for intervention is granted as a matter of course.[40] Correspondingly, the Supreme Court has also developed an open-door policy and allows '… essentially unlimited *amicus* participation.'[41] This has resulted in an explosive dynamic of *amicus*

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[32] Ibid.
[33] C Moyer 'The role of *amicus curiae* in the Inter-American Court of Human Rights' in *La Corte Inter-americana de Derechos Humanos: Estudios y Documentos* (1986) 113.
[34] Covey (n 21 above) 35.
[35] SH Walbolt & J H Lang Jr. '*Amicus* briefs: friend or foe of Florida courts?' (2003) 32/2 *Stetson Law Review* 270.
[36] 21 US 1 (1823).
[37] Ibid. In that case, the Court sought a legal opinion from one Henry Clay, a famed orator and Speaker of the House of Representatives in respect of a boundary dispute between Virginia and Kentucky, representing the interests of the landowners of the latter state.
[38] 193 US 65.
[39] OR Larsen 'The trouble with *amicus* facts' (2014) 100/8 *Virginia Law Review* 1768.
[40] Ibid. See also BJ Gorod 'The adversarial myth: appellate court extra-record fact finding' (2011) 61/1 *Duke Law Journal* 35.
[41] GA Caldeira & JR Wright '*Amici curiae* before the Supreme Court: who participates, when, and how much?' (1990) 52/3 *Journal of Politics* 782.

jurisprudence.[56] Interest groups and academics have in recent times taken keen interest in election petitions in that country. In one such case[57] the Ugandan Supreme Court admitted *amici curiae* because they possess 'valuable expertise, [and] specific information about the conduct of the 2016 elections that will offer a unique contribution for the resolution of the issues before Court.'[58]

However, there has not been much *amicus* activity in Francophone African civil law jurisdictions.[59] Going by the experience in other civil law countries, it is expected that with time, the phenomenon of *amicus* participation will extend to African civil law jurisdictions. The *amicus* participation has not only rapidly expanded from countries with common law traditions, where it originated, to civil law systems, but also from domestic to international dispute settlement fora.[60]

3.3 The emergence of *amici curiae* before international courts and tribunals

The chapter turns to consider the *amici curiae* practices of some select international judicial bodies and also discusses their *amicus* experiences to date, as well as the prospects for the further involvement of NGOs and other private actors as non-parties in the litigation of these adjudicative bodies. One general observation can be made from the outset: the role of *amicus* intervenors in international litigation varies according to the international adjudicative body before which it seeks to appear.[61] This observation will come into sharp relief during the course of this chapter.

3.3.1 The International Court of Justice

The study commences the discussion with the ICJ, where there has been negligible experience since as a matter of policy, this Court is reluctant to expand disputes

[56] J Oloka-Onyango & C Mbazira 'Befriending the judiciary: behind and beyond the 2016 Supreme Court *amicus curiae* rulings in Uganda (2016) 1 *Africa Journal of Comparative Constitutional Law* 14.
[57] *In the Matter of Foundation for Human Rights Initiative & 7 Others*, Civil Application no. 3 of 2016.
[58] Ibid. 3.
[59] SD Kamga 'An assessment of the possibilities for impact litigation in Francophone African countries' (2014) 14/2 *African Human Rights Law Journal* 472. See also AK Abebe & CM Fombad 'The advisory jurisdiction of constitutional courts in Sub-Saharan Africa' (2013) 46(1) *George Washington International Law Review* 95.
[60] L Vierucci 'NGOs before international courts and tribunals' in P-M Dupuy & L Vierucci (eds) *NGOs in international law: efficiency in flexibility?* (2008) 163.
[61] L Bastin 'The *amicus curiae* in investor–state arbitration' (2012)1/3 *Cambridge Journal of International Law* 208.

beyond the parameters set by the record parties.[62] In principle, the ICJ admits *amici curiae* in both its contentious and its advisory proceedings. Regarding contentious proceedings, article 34(2) of the Statute of the ICJ[63] states that the Court 'may request of public international organisations information relevant to cases before it and shall receive such information presented by such organisations on their own initiative.' For avoidance of doubt, the last part of this provision clarifies that a 'public international organisation' is for intervention purposes, 'an inter-governmental organisation.'

Article 69(4) of the Court's Rules, clarifies that a 'public international organisation' refers to 'an international organisation of states' i.e. an inter-governmental organisation.[64] This means that NGOs and other non-state actors are not allowed to file *amicus* briefs in a contentious proceeding of the Court. Thus, in the *Colombian-Peruvian Asylum* case,[65] the ICJ rejected an *amicus* brief from an NGO, namely the International League for the Rights of Man (now the International League for Human Rights) on the ground that the filer was not an international organisation as contemplated by its Statute and Rules of Procedure.[66]

It could be plausibly contended that NGOs and other private actors should not be allowed to file *amicus* briefs in contentious proceedings before the ICJ because the consensual basis or character of jurisdiction in such cases implies that access to the Court must be restricted to the parties.[67] In the same vein, other authors contend that the Court should protect parties' autonomy, which incontestably constitutes an important aspect in international litigation, adding that this will ensure that the confidence of states in the Court is maintained.[68] Before being appointed to the ICJ, Higgins once wrote that 'the International Court settles disputes between states.

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[62] Y Ronen & Y Naggan 'Third parties' in CPR Romano *et al* (eds) *The Oxford handbook of international adjudication* (2015) 823.
[63] Available at: http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf (accessed 09 July 2018).
[64] E Valencia-Ospina 'Non-Governmental Organisations and the International Court of Justice' in T Treves *et al* (eds) *Civil Society, International Courts and Compliance Bodies* (2005) 227.
[65] [1950] ICJ Reports 266.
[66] A-K Lindblom *Non-Governmental Organisations in International Law* (2005) 304.
[67] R Ranjeva 'Settlement of Disputes' in RJ Dupuy & D Vignes (eds) *A handbook on the new law of the sea* (1991) 1333.
[68] P Palchetti 'Opening the International Court of Justice to third states: intervention and beyond' (2002) 6 *Max Planck United Nations Yearbook Law* 174.

Cases cannot be brought by individuals and indeed, neither they nor [NGOs] have any standing to intervene in inter-state litigation by *amicus* briefs.'[69]

Some writers hold the view that opening the Court to submissions by private actors exposes the Court to the danger of being overwhelmed by briefs 'whose quality would be disparate and thus significantly less reliable than those coming from inter-governmental bodies.'[70] The exclusion of civil society from the contentious proceedings of the ICJ has been criticised as out of keeping with developments in international law, a considerable bulk of which have implications for individuals, corporations and other private entities.[71] To circumvent the rigours of the ICJ *amicus* procedures, on occasion states annex materials by NGOs in their written submissions. In such cases NGO submissions form part of the states' memorials and therefore part of the official file.[72] This makes the brief an official submission of the state.[73] This was the case in *Gabcikovo-Nagymaros Project*,[74] where the Hungarian government submitted documents prepared by NGOs, namely the National Heritage Institute and the International River Network as part of its memorials.[75]

In relation to advisory proceedings, the ICJ is authorised by article 66(2) of its Statute to request or receive written or oral submissions from 'international organisations' which it considers as competent to furnish it with information beyond the grasp of parties or the Court. It appears that the assumption underlying this less restrictive approach is that the Court should take into consideration as much information as possible from a variety of sources if the advisory opinion is to command respectability in the international community.[76] Further, unlike in the context of a contentious case,

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[69] R Higgins *Themes and theories, selected essays, speeches and writings in International law* (2009) 908.
[70] R Kolb *The International Court of Justice* (2013) 279.
[71] RY Jennings 'The International Court of Justice after fifty years' (1995) 89/3 *American Journal of International Law* 504; P-M Dupuy 'Article 34' in Andreas Zimmermann *et al* (eds) *The Statute of the International Court of Justice* (2006) 549.
[72] S Santivasa 'NGO's participation in the proceedings of the International Court of Justice' (2012) 5/2 *Journal of East Asia and International Law* 390. See also A von Bogdandy & I Venzke 'On the democratic legitimation of international judicial law making' in A von Bogdandy & I Venzke (eds) *International Judicial Law-making: on public authority and democratic legitimation in global governance* (2012) 505.
[73] Brabandere (n 3 above) 93.
[74] *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7.
[75] Lindblom (n 66 above) 304.
[76] Ibid.

there is no party autonomy to be sensitive to in an advisory proceeding.[77] Moreover, unlike article 34 of the ICJ Statute which has been referred to earlier which refers to 'public international organisations', article 66(2) instead uses the expression 'international organisation'. However, this appears to be a question of style and nothing of substance seems to turn on this linguistic variation.

In its advisory jurisdiction – the ICJ has only once – in *International Status of South-West Africa*,[78] interpreted its rules liberally and acceded to a request by an NGO, namely, the International League of the Rights of Man, to file an *amicus* brief. The Court directed that the brief be limited to legal questions and should not deal with any statements of facts which the Court had not been invited to pronounce itself upon. However, no submission was made in this case as the NGO did not file the brief within the timeframe ordered by the Court, as the statements arrived a month after the deadline.[79] It is for the same reason that the League was denied the opportunity to participate in the oral hearing of the case.[80]

The liberal approach adopted towards *amici curiae* by the Court in 1950, regrettably not taken advantage of at the time, has not been replicated in the Court's subsequent practice.[81] As a result, the lackadaisical attitude of the League in this case – despite it being one of the premier NGOs of the time – has been considered as a missed opportunity by many.[82] In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution* 276,[83] the Court rejected a request for *amicus* intervention made by the League without providing reasons for its decision. In this case, the Court also rejected a request by Professor Reisman of Yale University, who had written to the Court

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[77] Ibid.
[78] ICJ Reports (1950) 128.
[79] A Dolidze 'Advisory Opinion on responsibility and liability for international seabed mining (ITLOS Case no. 17) and the future of NGO participation in the international legal process' (2013) 19/2 *ILSA Journal of International and Comparative Law* 393.
[80] Santivasa (n 72 above) 393.
[81] Valencia-Ospina (n 64 above) 230. See also N Rodley 'Human Rights NGOs: rights and obligations' in T Van Boven *et al* (eds.) The legitimacy of the United Nations: towards an enhanced legal status of non-state actors (1997) 57.
[82] N Leroux 'NGOs at the World Court: lessons from the past' (2006) 8/2-3 *International Community Law Review* 215.
[83] ICJ Reports (1971) 16.

expressing his desire to file an *amicus* brief in the case, pointing out that there was no bar to his intended action under the ICJ statute.[84]

In replying to this request, the Registrar of the Court pointed out that article 66(2) of the ICJ Statute was 'limitative and exclusive,' asserting that the decision to allow the International League to file a statement could not be taken as a precedent for the future participation of NGOs in the litigation of the Court.[85] He concluded that 'the Court would be unwilling to open the floodgates to what might be a vast amount of proffered assistance'.[86] The argument that *amicus* interventions by NGOs may deluge the Court is also shared by some writers on the Court.[87] However, the fear of a deluge or the opening of the floodgates of *amici curiae* in international law has remained a myth.

It is important to point out that the restrictive attitude of the ICJ towards *amicus* briefs sharply deviates from the legacy of its predecessor, the PCIJ. The latter Court allowed for the inclusion of NGOs in its proceedings.[88] More critically, and contrary to the position adopted by its successor, the PCIJ took the view that the term 'international organisations' included NGOs in its purview.[89] In particular, trade unions and workers' organisations utilised the procedure to put across their demands before the Court. International trade unions participated extensively in the advisory proceedings of the Court and offered it information.[90]

Although the ICJ remains generally closed to NGO participation, a critical step was taken in 2004 with the promulgation of Practice Direction XII,[91] which allows NGOs some scope of participation as *amici curiae* in the Court's advisory proceedings.

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[84] ICJ Pleadings, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) 11, 63.
[85] Letter from the Registrar to Professor Reisman, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1970 ICJ Pleadings, II, 638–639.
[86] Ibid.
[87] Kolb (n 70 above) 278 – 279.
[88] K Martens 'Examining the (non-)status of NGOs in international law' (2003) 10/2 *Indiana Journal of Global Legal Studies* 4.
[89] LC White *International Non-Governmental Organizations: their purposes, methods, and accomplishments* (1968) 156. D Shelton *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, (1994) 88/4 *American Journal of International Law* 622.
[90] Martens (n 88 above) 14.
[91] Practice Directions, ICJ-CIJ.ORG, available at:
http://www.icjcij. org/documents/index.php?p1=4&p2=4&p3=0 (last visited 04 February 2016).

Paulus is of the view that the promulgation of this Practice Direction was borne out of the recognition by the Court of the growing role of NGOs in international proceedings and advisory opinions in particular.[92] Rosenne describes the regulation as 'hesitant, if not grudging acknowledgement of the growing importance of the work of NGOs in the international sphere.'[93] In terms of paragraph 1 of the Direction however, '[w]here an [NGO] submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file.'

While documents or statements by international NGOs are excluded from the official case file, paragraph 2 of the Practice Direction clarifies that they are to be treated as public information. In practice, these materials have been made available to members of the Court by placing them in the library.[94] Materials submitted by *amici curiae* before the Court are treated merely as publications and may be relied upon by the Court and the parties to the dispute as such. The practice of placing these NGO submissions in the library of the Court is out of keeping with the modern practices of information dissemination adopted by NGOs, which ensure that their statements are immediately available to the general public.[95] It is suggested that the Court should explore the option of putting these statements on its website as the Chamber of the ITLOS has done in its first advisory proceeding.[96]

Overall, the reticence of the Court towards admitting *amici curiae* in its litigation is rationally indefensible, not least because, as stated earlier, case outcomes of the ICJ have implications for the rights of individuals. It has also been argued that the Court's approach towards *amicus* briefs is too restrictive and does not reflect the modern world legal order, which is characterised by the growing influence of non-state actors.[97] Chinkin also expresses the critical view that:

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[92] A Paulus 'Article 66' in Zimmermann *et al* (eds) *The Statute of the International Court of Justice: a commentary* 1065.
[93] S Rosenne 'International court of Justice' in R Wolfrum (ed.) Max Planck encyclopaedia of international law para 107.
[94] Brabandere (n 3 above) 94.
[95] Paulus (n 92 above) 1656.
[96] Ibid.
[97] P-M Dupuy 'Article 34' in Zimmermann et al (eds.) *The Statute of the International Court of Justice: a commentary* (2012) 549. See also JJ Quintana *Litigation at the International Court of Justice: practice and procedure* (2015) 6-7.

> The Court's attitude towards submissions from non-governmental sources is an excessively restrictive one which denies to itself a potential source of information, and to non-governmental organizations any legitimate interest in important questions of international law. No exception is made for those bodies with observer status before organs of the United Nations such as ECOSOC, or which participate in human rights committees. Even in its advisory jurisdiction the Court distinguishes itself from the political organs of the United Nations in its extreme position with respect to non-governmental organizations.[98]

The introduction of the *amicus* procedure in the litigation of the Court would prove useful, particularly when obligations *erga omnes* norms are at issue before the Court.[99] Rosenne has also suggested that 'in the interests of the proper administration of international justice', the ICJ ought to invoke its powers to accept *amicus* briefs in its proceedings to avail to itself a different perception of the facts and a different construction of the applicable legal principles. He reasons that this would, amongst other things, enhance the Court's prestige and moral standing.[100] To this end, Razzaque suggests that a review of the Court's Rules of Procedure would be necessary to allow for the admission of NGOs that might wish to intervene as *amici curiae* in its proceedings.[101] This re-interpretation is unlikely to find favour among states as they strive to assert their monopoly over the international field.

3.3.2 The International Tribunal for the Law of the Sea

Like the ICJ, the ITLOS has adopted a restrictive approach to the participation of NGOs as *amici curiae* in its litigation.[102] This has led writers to call on the Tribunal to accommodate the interests of third parties in its interpretive task.[103] The Statute of the ITLOS[104] is silent on the possibility of *amicus* intervention. However, the Tribunal's

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[98] C Chinkin *Third Parties in International Law* (1993) 232.
[99] Palchetti (n 68 above) 177.
[100] S Rosenne 'Reflections on the position of the individual in inter-state litigation in the International Court of Justice' in P Sanders (ed.) *International Arbitration* (1967) 250.
[101] J Razzaque 'Changing role of friends of the court in the international courts and tribunals' (2002) 1/3 *Non-State Actors and International Law* 172.
[102] R Wolfrum 'Interventions in the proceedings before international courts and tribunals: to what extent may interventions serve the pursuance of community interests?' in N Boschiero *et al* (eds) *International Courts and the development of international law* (2013) 227. See also Bastin (n 61 above) 210.
[103] See JE Noyes 'The International Tribunal for the Law of the Sea' (1999) 32/1 *Cornell International Law Journal* 158.
[104] Available at: https://www.itlos.org/fileadmin/itlos/documents/basic_texts/statute_en.pdf (accessed 02 March 2017).

Rules of Procedure[105] make provision for the participation of *amici curiae* in both contentious and advisory proceedings of the Tribunal under articles 84 and 133, respectively. As shall be seen, these articles are closely modelled on articles 34 and 66 of the ICJ, except that those of the ITLOS are relatively elaborate and detailed. In a contentious proceeding, the Tribunal may at any stage before the closure of oral proceedings, and at the behest of a party or on its own initiative, request an appropriate inter-governmental organisation to offer it information relevant to a case brought before it.[106]

After conferring with the administrative officer of the organisation concerned, the Tribunal decides whether such information is to be presented to it orally or in writing, and also fixes timelines for its presentation.[107] The Rules of Procedure of ITLOS also permit inter-governmental organisations to furnish the Tribunal with submissions which are relevant to a case before it. Such submissions are to be lodged in the Tribunal's Registry before the closure of written proceedings.[108] The Tribunal may call upon an organisation that has filed an *amicus* brief to supplement it orally or in writing, as the case may be. This is to be done in the form of answers to any questions which the Tribunal may see fit to raise, and may also permit the parties to comment, either orally or in writing, on the submissions thus offered.[109]

An inter-governmental organisation may also be authorised to furnish observations to the Tribunal when it is seized with a question dealing with the construction of the constituent instrument of such an organisation or any other international instrument adopted thereunder.[110] The Tribunal or its President (if the Tribunal is not sitting) sets timelines for the filing of such observations, which are to be transmitted to the parties for their consideration.[111] The parties may, if so minded, discuss these observations during the course of oral proceedings.[112] With regard to advisory proceedings, the Tribunal accepts only solicited briefs. Once an advisory opinion has been requested

[105] ITLOS/8. Adopted 17 March 2009.
[106] Rule 84(1) thereof.
[107] Ibid.
[108] Rule 84(2).
[109] Ibid.
[110] Rule 84(3).
[111] Ibid.
[112] Ibid.

from the Tribunal, the Registrar of the Tribunal immediately puts States Parties on notice about the request.[113]

The Chamber of the Tribunal or Its President (if the Chamber is not sitting) proceeds to identify the intergovernmental organisations which may be able to assist the Tribunal with information on the question falling for determination. The Registrar in turn gives notice to such organisations.[114] The states or organisations referred to above are invited to present written statements on the issue(s) within a timeline designated by the Tribunal.[115] Such statements are to be transmitted to States Parties and organisations which have proffered written statements. The Tribunal may fix further timelines within which such States Parties and organisations may make comments on the filed statements.[116] The Tribunal may then proceed to determine whether oral hearing will be necessary, and if so, designate a date for such purpose. States Parties and the organisations referred to in the preceding passages are invited to make oral submissions at the hearing.[117]

Although there are striking similarities between the rules of the ICJ and those of the ITLOS insofar as they deal with the admission of *amici curiae*, there are also differences between them. The first difference between article 84 of the ITLOS Rules and Article 34 of the ICJ Statute has to do with the juridical nature of the entities entitled to offer information. As seen earlier, article 34(2) and (3) of the ICJ Statute speaks of 'public international organizations,' a phrase which some authors have strenuously argued could be interpreted liberally to include international NGOs.[118] There is no room for uncertainty with regards to article 84 of the ITLOS Rules, which restricts participation before the Tribunal to 'intergovernmental organizations.'

Another major difference is that while all States Parties are entitled to proffer statements to the ITLOS in an advisory proceeding under article 133 of the ITLOS Rules, article 66 of the ICJ Statute limits such a right to only those states which were

[113] Rule 133(1).
[114] Rule 133(2).
[115] Rule 133(3).
[116] Ibid.
[117] Rule 133(4).
[118] L Bartholomeusz 'The *amicus curiae* before international courts and tribunals, non-state actors and international law' (2005) 5/3 *Non-State Actors and International Law* 229.

considered as being 'likely to be able to furnish information on the question.'[119] Moreover, article 133 of the ITLOS Rules eliminates the interpretative uncertainties contained in article 66 of the ICJ Statute by replacing the term, 'international organization' with 'intergovernmental organization'[120] The devastatingly apodictic manner in which Rule 133 of ITLOS is drafted, scarcely leaves any scope for arguing that NGOs could be admitted as *amici curiae* in the advisory proceedings of this body.[121]

Despite the evidently absolutist language of the ITLOS Rules, NGOs could not be de-spirited. In the Advisory Opinion concerning *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*,[122] Greenpeace and World-Wide Fund for Nature (WWF) sought permission to intervene as *amici*, but their request was declined. However, the joint statement of the two organisations was published on the ITLOS website, with a clear note that it was not part of the official case file.[123] The statement was also transmitted to State Parties, the International Seabed Authority (ISA) and inter-governmental organisations that had submitted written observations.

By transmitting the submissions of the two NGOs to States Parties and relevant Inter-Governmental Organisations, ITLOS facilitated the process of sharing NGO insights with the parties, which allowed these parties to take into consideration the concerns and viewpoints addressed in the brief.[124] It may be profitably argued that in that way, the Tribunal allowed concerned private entities to achieve the objectives which would have been similarly realised if their submissions had been considered to be part of the official case file.[125] By its decision in the aforesaid opinion, the ITLOS went down the path that many international judicial tribunals around the world have taken before it,

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[119] Ibid. 230.
[120] Ibid. In public international law, the term inter-governmental organisation (or international) organisation refers to an organisation possessing international legal personality established through a treaty 'with a constitution and common organs.' See, P Gautier 'NGOs and law of the sea disputes' in T Treves *et al* (eds), *Civil Society, International Courts and Compliance Bodies* (2005) 239.
[121] Gautier, Ibid.
[122] ITLOS Case no. 17, Judgment of 1 February 2011.
[123] See C Zengerling *Greening International jurisprudence: environmental NGOs before international courts, tribunals, and compliance committees* (2013) 233.
[124] Dolidze (n 79 above) 397.
[125] Ibid.

albeit in a timid fashion. The cautious opening of the Tribunal's proceedings to NGOs, may be seen as a faint sign that eventually the ITLOS is beginning to be receptive to the involvement of NGOs in its curial processes.

3.3.3 The WTO and investment bodies

The admittance of *amicus curiae* before the World Trade Organisation (WTO) dispute settlement bodies has been a highly controversial issue.[126] Although there is no specific provision in the Dispute Settlement Understanding (DSU) or Working Procedures for Appellate Review instruments governing litigation in the WTO system that authorises the filing of *amicus* briefs, WTO bodies receive such briefs, but practice in this regard has varied considerably.[127] In the *US-Shrimp* case,[128] two environmental NGOs submitted briefs before a WTO panel arguing that this body was required to accept and consider submissions brought before it by *amici curiae* in terms of article 13 of the DSU.[129] Article 13 thereof, titled *Right to seek information*, gives panels the authority 'to seek information and technical advice from any individual or body which it deems appropriate.'

The panel refused to accept the *amicus* briefs from the NGOs on the ground that the aforesaid provision prohibits the filing of unsolicited briefs. However, the panel allowed record parties to incorporate them into their submissions if they wished to do so.[130] The matter was appealed to the WTO Appellate Body. In what Mavromadis describes as a 'rather acrobatic interpretation' of the term 'to seek,'[131] the Appellate Body held that:

> In the present context, authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel.

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[126] Subedi (n 9 above) 138.
[127] G Marceau & M Stilwell 'Practical suggestions before *amicus curiae* briefs before WTO adjudicating bodies' (2001) 4/1 *Journal of International Economic Law* 158.
[128] Appellate Body Report, *United States Import Prohibition of Certain Shrimp and Shrimp Products* (*Shrimp Turtle* case), WT/DS58/AB/R, Decision of 12 October 1998.
[129] Available at: https://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (accessed 02 May 2016).
[130] *Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Panel, WT/DS58/R, para 7.8, Decision of 15 May 1998.
[131] P Mavroidis '*Amicus curiae*' briefs before the WTO: much ado about nothing' *Harvard Jean Monnet Working Paper* 02/01, 3.

> A panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*.[132]

The WTO Appellate Body also dealt with the competence of WTO bodies to receive *amicus* submissions from private entities in the *US-British Steel* case.[133] This body stressed the point that it has 'the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which [it] find[s] it pertinent and useful to do so.'[134] The Appellate Body also asserted its authority to admit *amicus* briefs in *Lead and Bismuth II*, when it pointed out that 'we have the legal authority to decide whether or not to accept and consider any information that we believe is pertinent and useful in an appeal.'[135] At the same time the Appellate Body emphasised that:

> Individuals and organisations, which are not members of the WTO have no legal right to make submissions to or be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited *amicus curiae* briefs submitted by individuals or organisations, not members of the WTO. The Appellate Body has a legal duty to accept and consider only submissions from WTO members which are parties or third parties in a particular dispute.[136]

Ultimately, in giving its decision, the Appellate Body did not find it necessary to consider filed briefs.[137] This, however, did not stop WTO Members from once again criticising the Appellate Body's decision to open the WTO dispute settlement process to NGO involvement.[138] Another case worth noting is the *Asbestos* case.[139] In this case, the panel had received five *amicus* briefs, two of which it took into account and rejected the rest. Perhaps owing to the criticism of WTO members that the WTO adjudicative bodies lacked a clear policy on the admission of *amici curiae*, the Appellate Body decided to adopt an *ad hoc* procedure to govern *amicus* admission in that particular case.

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[132] *Shrimp Turtle* case (n 128 above) para 108.
[133] *Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the UK*, Report of the Appellate Body, WT/DS138/AB/R, Decision of 10 May 2000.
[134] Ibid. para 39.
[135] Ibid. para 39.
[136] Ibid. para 41.
[137] Ibid. para 42.
[138] Bartholomeusz (n 118 above) 258.
[139] WTO Report of the Panel, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products,* WTO Doc No WT/DS1 35/R, Decision of 18 September 2000.

This *ad hoc* procedure required, among other things, that an entity seeking to participate as an *amicus curiae* before the WTO dispute bodies should show in advance that it would make a 'contribution to the resolution of this dispute that is not likely to be repetitive of what has already been submitted by a party or third party to this dispute.'[140] Again, this *ad hoc* procedure caused a stir among several WTO members, who argued that it prioritised non-state actors and also ran the risk of saddling parties to disputes with unmanageable volumes of proffered materials. Members also accused the Appellate Body of failing to adhere to the DSU (with only the US fighting from its corner).[141] Following the adoption of the *ad hoc* procedure, the Appellate Body subsequently received a total of seventeen *amicus* briefs in this case. Six of them were rejected on the ground that they were filed late and the remainder of the briefs were dismissed on the basis that they were not fully compliant with the newly introduced procedure for NGO participation.[142]

Although it originally appeared that the door leading to the WTO dispute settlement bodies was wide open for NGOs, practice seems to suggest otherwise.[143] Charnovitz observes that despite the initial fanfare about *amici curiae* opportunities at the WTO tribunals, neither the Appellate Body nor the panels have made meaningful use of the information offered by NGOs in their briefs.[144] However, other writers note that even though the WTO bodies have never formally made reference to *amicus* briefs, empirical studies have shown that these bodies consider them and are thus open to the persuasive force they might carry.[145] These authors argue that the Appellate Body's continued acceptance of *amicus* submissions from NGO's, though timid, signifies that the filing of *amicus* briefs is now part of the WTO judicial policy.[146]

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[140] *See* GATT Appellate Body Report on European Community.- *Measures Affecting Asbestos and Asbestos-Containing Products*., Wf/DS135/AB/R, Decision of 21 March 2001.
[141] P Ala'i 'Judicial lobbying at the WTO: the debate over the use of *amicus curiae* briefs and the US experience' (2000) 24/1 *Fordham International Law Journal* 67.
[142] HS Gao '*Amicus curiae* in WTO dispute settlement: theory and practice' (2006) *1 China Rights Forum* 53.
[143] Quoted in Bartholomeusz (n 118 above) 263.
[144] S Charnovitz 'Non-Governmental Organizational and International Law' (2006) 100/2 *American Journal of International Law* 354.
[145] G Shaffer *et al* 'The extensive (but fragile) authority of the WTO Appellate Body' (2016) 79/1 *Journal of Law and Contemporary Problems* 254.
[146] Ibid.

The *amicus* practice of the WTO tribunals has percolated to other related areas, such as international investment law. International investment arbitral bodies have also begun accepting *amicus* briefs, despite the fact that the dispute settlement regimes of these bodies is traditionally closed to participation by third parties.[147] Although the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules are silent on *amicus* interventions, drawing on the practice of the WTO and Iran-US Claims Tribunal, a Chapter 11 North American Free Tree Trade Agreement Arbitral Tribunal (the NAFTA Tribunal) ruled for the first time in *Methanex Corporation v US*[148] that it had the power to accept *amicus* briefs. It reasoned that '[t]he receipt of written submissions from a non-party third person does not necessarily offend the philosophy of international arbitration involving states and non-state parties.'[149]

Although the ICSID Tribunal refused an *amicus* intervention in its earlier decision of *Aguas del Tunari v Republic of Bolivia*,[150] based on a restrictive reading of the consensual nature of investment arbitration, it subsequently asserted its power to receive and consider *amicus* briefs for the first time in 2005 in *Suez/ Vivendi*.[151] In proffering the reasons for admitting *amicus* briefs in that case, it stated that '[t]he purpose of *amicus* submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, expertise, and perspectives that the parties may not have provided.'[152]

Following the *Suez/ Vivendi* case, the ICSID Rules were amended in 2006 to confer specific powers on the ICSID Tribunal to admit *amicus* briefs.[153] In *Biwater Gauff v United Republic of Tanzania*,[154] a dispute concerning water supply services, the ICSID

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[147] Brabandere (n 3 above) 98.
[148] *In the Matter of an International Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules, Between Methanex Corporation and the United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as 'Amici Curiae'* para 32 (15 January 15 2001). Available at: http://naftaclaims.com/Disputes/USA/Methanex/MethanexDecisionReAuthority*Amicus*.pdf (accessed 06 February 2016).
[149] Ibid. para 32.
[150] See *Aguas del Tunari v Republic of Bolivia* ICSID Case no. ARB /02/3, Decision of 21 October 2005.
[151] *Suez Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic,* ICSID Case no. ARB/03/19, Order in Response to a Petition for Participation as *Amicus curiae* (19 May 2005)
[152] Ibid. para 24.
[153] See Rule 37(2) thereof.
[154] ICSID Case no. ARB/0522, Award of 24 July 2008.

Tribunal underlined the usefulness and relevance of *amici curiae* in the following words:

> As noted earlier, the Tribunal has found the *amici's* observations useful. Their submissions have informed the analysis of claims set out below, and where relevant, specific points arising from the *amici's* submissions are returned to in that context.[155]

For its part, the Investment Committee of the Organisation for Economic Cooperation and Development (the OECD Investment Committee) has remarked that 'members of the Investment Committee generally share the view that, especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation, subject however to clear and specific guidelines'.[156]

3.3.4 International criminal courts and tribunals

The use of *amicus curiae* is increasingly gaining wide acceptance among international criminal courts and tribunals.[157] It has been said that these bodies have some of the most flexible and liberal third party intervention rules and practices.[158] States, NGOs and individuals can intervene in the proceedings of the International Criminal Court (ICC) in one of two ways: through a solicited brief or through the filing of a spontaneous brief in which an entity seeking to be admitted applies to the Court on its own initiative.

Rule 103 (1) of the Rules of Procedure and Evidence of the ICC states that if a Chamber 'considers it desirable for the proper determination of the case, it may invite or grant leave to a state, organisation or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.' It has been correctly pointed out that the term 'organisation' is unqualified and is therefore sufficiently broad to include NGOs.[159] *Amicus* entities can file their opinions at 'any stage of the

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[155] S Williams & H Woolaver 'The role of the *amicus curiae* before international criminal tribunals' (2006) 6/2 *International Criminal Law* 151.
[156] Report, OECD Investment Committee, Transparency and third-party participation in investor-state dispute settlement procedures 1. Available at: https://www.oecd.org/daf/inv/investment-policy/WP-2005_1.pdf (accessed 21 April 2016).
[157] Williams & Woolaver (n 155 above) 151.
[158] Viljoen & Abebe (n 46 above) 28.
[159] Bartholomeusz (n 118 above) 242. See also G Boas *The Milošević trial: lessons for the conduct of complex international criminal proceedings* (2007) 250.

proceedings' either by appearing in person or by lodging a brief through the Court's Registry.[160]

The prosecution and the defence have a right to make comments on filed *amicus* briefs once the Chamber has granted leave to intervene.[161] It is entirely within the discretion of the Court to decide whether or not to grant leave for intervention;[162] to specify issues in respect of which observations may be filed;[163] and to determine the length of the brief and the timelines for filing.[164] A two-part test has been laid down for the admission of *amicus curiae* by the Court.[165] First, the intervention should be 'desirable for the proper determination of the case.'[166] Second, the submissions made should 'relate to an issue that the Chamber deems appropriate.'[167]

The Court has generally been cautious in admitting *amicus* briefs, with a view to avoid complicating proceedings unnecessarily.[168] In addition, the ICC is yet to extend an invitation to potential *amici curiae* to file briefs before it despite the language of article 103(1) above.[169] It has stated that the intervention by an *amicus curiae* should not be allowed to compromise the 'expeditiousness of the proceedings as one of the fundamental tenets of their fairness.'[170] On the basis of the foregoing, coupled with the fact that an *amicus curiae* is by definition not a party to the case, the ICC resorts to '*amicus curiae* observations only on an exceptional basis.'[171]

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[160] Rule 103(3).
[161] Rule 103(2).
[162] *Prosecutor v Lubanga*, NO ICC – 01/04-01/06-3034, 22 April 2008, (AC Decision on the Application by Child Soldiers International for leave to submit observations pursuant to Rule 103 of the Rules of Procedure and Evidence), para 11.
[163] *Prosecutor v Bemba*, NO ICC-01/05-01/08, 20 April 2009 (Decision on application for leave to submit *amicus curiae* observations pursuant to Rule 103 of the Rules of Procedure and Evidence), para 12.
[164] Ibid. para 14
[165] K Ambos *Treatise on international Criminal Law* (2016) 204.
[166] Rule 103(1), *Prosecutor v Lubanga* (n 162 above) para 8.
[167] Rule 103 (1), Situation in the Democratic Republic of the Congo (Decision on the request submitted pursuant to Rule 103 of the Rules of Procedure and Evidence), para 3.
[168] LE Carter *et al The International Criminal Court in an effective global justice system* (2016) 271.
[169] S Williams & E Palmer 'Civil society and *amicus curiae* interventions in international criminal law' (2016) 15/1 *Acta Juridica* 51.
[170] *Prosecutor v Bemba* (n 163 above) para 15.
[171] *Prosecutor v Ntanganda* ICC-01/04-02/06, 15 June 2017, (Decision on the application by the Redress Trust to submit *amicus curiae* observations), para 3.

Amicus organisations have occasionally been called upon by the Court to play the role of defence counsel for unrepresented accused persons.[172] As at the beginning of 2017, sixty-three applications for *amicus* intervention have been made before the Court. Of these, twenty-one were granted and the rest were rejected.[173] The influence that *amicus curiae* briefs have had on case outcomes is difficult to assess, as many cases are still pending while others have been terminated without a decision on the merits.[174] Where decisions have been rendered, reference to *amicus* briefs is scarce.[175]

Similarly, Rule 74 of Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (ICTY Rules) states that '[a] Chamber may, if it considers desirable for the proper determination of the case, invite, or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.' As in the case of the ICC, States, NGOs and individuals can intervene in the proceedings of the ICTY by request or on their own initiative. In the case of a request, the Tribunal spells out the issues in respect of which submissions must be filed.[176] The first brief was filed before this body in 1999 in *Prosecutor v Dusco Tadić*,[177] the first trial for international war crimes since the Nuremburg trials. The Court received several briefs from scholars and civil organisations.

The Tribunal continued to receive both solicited and unsolicited briefs in subsequent cases,[178] and these briefs originated mainly from scholars of international human rights law and representatives of NGOs.[179] As with the ICC, in some cases before the ICTY, *amici curiae* were appointed to assist a criminal defendant who had not engaged

[172] Ambos (n 165 above) 204.
[173] Carter *et al* (n 168 above) 272.
[174] Ibid. 286.
[175] Ibid.
[176] Ibid. 292.
[177] Case no. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995).
[178] See e.g. *Prosecutor v Radovan Krajišnik* Case no. IT-00-39-A, Decision on *Krajišnik's* to self-represent on Counsel's Motions to Relation to Appointment of *Amicus curiae* and on the Prosecution Motion of 16 February 2007 (11 May 2007); *Prosecutor v Blaškić* Case no. IT-95-14, PT Order submitting the matter to Trial Chamber II and inviting *amicus curiae* (14 May 1996); *Prosecutor v Jadranko Prlić et al* Case no. IT-04-74-T, Order Appointing an *Amicus curiae* (3 July 2009), among others.
[179] Razzaque (n 101 above) 193.

a legal representative. This was the case in *Prosecutor v Slobodan Milošević*.[180] As regards the impact thereof, Williams and Woolaver have come to the conclusion that it is generally difficult to establish the influence that *amicus* submissions have had on the decisions of the ICTY.[181] They point out that some decisions contain thrifty or no reference at all to the *amicus* briefs filed.[182] In addition, the briefs themselves are often not available, thus limiting the ability to compare the decisions with the contents of the filed briefs.[183]

The language of Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (the ICTR Rules) is identical to that of Rule 74 of the ICTY Rules. The ICTR has granted leave for *amicus* intervention in its first cases which include *Prosecutor v Jean-Paul Akayesu*[184] and *Prosecutor v Theoneste Bagasora*.[185] Both cases concern the prosecution of the accused persons for their roles in the perpetration of genocide in Rwanda. In the former case, originally the indictment against the accused did not contain charges of sexual crimes, in addition to the charge of genocide, despite the existence of overwhelming evidence pointing to the accused person's involvement in the commission of mass rape during the genocide.

During the course of Mr Akayesu's trial, evidence of his role in sex crimes emerged. On the basis of this information and on evidence documented by Human Rights Watch, the Prosecutor preferred additional charges of sexual crimes against Mr Akayesu. The Prosecutor amended the charge and included rape as an additional count. Mr Akayesu was subsequently tried and convicted of rape as an act of genocide. This decision laid an important precedent in this regard. The Tribunal has also been a beneficiary of *amicus* submissions in many subsequent cases. With regard to influence, it has been noted that as is the case with the ICTY, the influence of *amicus* briefs in the decisions of the ICTR is generally difficult to discern, for much the same reasons.[186]

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[180] Case no. IT-02-54, Judgment of 29 August 2005.
[181] Williams & Woolaver (n 155 above) 159.
[182] Ibid.
[183] Ibid.
[184] Case no. ICTR-96-4-T, (Trial Chamber 1), Judgment of 2 September 1998.
[185] Case no. ICTR 96-7-1, Judgment of 18 December 2008.
[186] Williams & Woolaver (n 155 above) 173.

The Rules of Procedure and Evidence of the Special Court for Sierra Leone (the SCSL Rules) are formatted along the lines of the ICTY and ICTR Rules. Rule 74 thereof similarly states that '[a] Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to make submissions on any issue specified by the Chamber'. The SCSL has also adopted a Practice Direction governing the filing of *amicus curiae* briefs.[187] Requests for intervention as *amici curiae* before the SCSL have been granted in a number of cases, including in the trial against the Former President of Liberia, Mr Charles Taylor.[188] *Amicus curiae* briefs have also been submitted to the Extraordinary African Chambers in the Senegalese Courts established to try former Chadian leader, Mr Hissene Habré, for crimes against humanity, war crimes and torture committed during his rule between 1982 and 1990.

3.3.5 The European Court

In terms of article 36(2) of the European Convention, the Court may 'in the interests of the proper administration of justice', solicit written or oral submissions from 'any person concerned.'[189] This undoubtedly includes NGOs, groups and individuals. In some cases, the Court has referred to this as 'the right to intervene',[190] although it is quite clear from the reading of the Convention that this is over-stating the position.[191] To be clear, there is nothing contained in the European Convention that contradicts the long-held position that *amicus* intervention is a matter of the court's grace and not of right.

The possibility of the Court's admitting *amici curiae* was first formally recognised under the Revised Rules of the Court adopted on 24 November 1982, although as will be shown below, the practice of the Court of receiving *amicus* briefs from NGOs began earlier than this. Commenting on the development of the *amicus* in the Europea system in 1990, Lester noted that this procedure opened 'new and important'

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[187] Practice Direction on filing *Amicus curiae* applications pursuant to Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone, 20 October 2004.
[188] *Prosecution v Charles Ghankay Taylor* SCSL-2003-01-1, 26 September 2013. The SCSL also granted *amicus* intervention in *Prosecutor v Morris Kallon* Case no. SCSL-04-15-A, Judgment of 8 April 2009 *& Prosecutor v Sam Hinga Norman* SCSL-2004-14-AR72(E), Judgment of 31 May 2014.
[189] To quote it in *extenso*, article 36(2) states: 'The President of the Court may, in the interests of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.'
[190] *Saadi v Italy* [GC] no. 37201/06, 28 February 2008.
[191] WA Schabas *The European Convention on Human Rights: a commentary* (2015) 792.

opportunities for third parties to participate in the litigation of the Court.[192] The power of the European Court to entertain third party submissions was retained in its revised Rules of 01 February 1994[193] and is codified in the present Rules of the Court adopted on 14 November 2016.

Rule 44 of the current Court's Rules of Procedure[194] amplifies the aforesaid article 36(2) and provides the nuts and bolts for the admission of *amicus* third party interveners before the European Court. It prescribes, among other things, that the request to intervene must be 'duly reasoned' and written in one of the official languages of the Court: English or French.[195] Further, the brief must be lodged with the Court no later than twelve weeks after the Contracting Party has been duly notified of the application.[196] The objective of fixing timelines is to ensure that *amicus* participation does not unduly prolong the Court's proceedings.[197]

The timelines may be extended by the President of the Court where good cause is shown.[198] Where the timelines and other conditions set by the President are not observed, the President may elect not to include the observations or comments in the case file.[199] The consent of the principal parties to the case is not required for an *amicus* brief to be admitted by the Court, although any submission must be transmitted to the parties for their attention.[200] The Court may allow intervenors to participate in oral hearings only in exceptional cases.[201] The number of intervenors participating in oral hearings is negligible. This is because in the majority of cases, no hearings are held: cases are decided on the basis of filed pleadings only.[202]

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[192] A Lester '*Amici curiae*: third party interventions before the European Court of Human Rights' in F Matscher & H Petzold (eds) *Protecting Human Rights: the European dimension* (1988) 341.
[193] Rule 37(2) provided that: 'The President may, in the interest pf the proper administration of justice, invite or grant leave to any Contracting State which is not a party to the proceedings to submit written comments within a time-limit and on issues which he shall specify. He may extend such an invitation or grant such leave to nay person concerned other than the applicant.'
[194] Adopted on 16 April 2018.
[195] See Rule 44(2)(b) as read with Rule 34(1).
[196] Rule 44(1)(b). The 12-week timeline may be extended by the President of the Court on good cause shown by the party seeking such an extension.
[197] Bartholomeusz (n 118 above) 240.
[198] Rule 44(4) thereof.
[199] P van Dijlk *et al Theory and practice of the European Convention on Human Rights* (2006) 206.
[200] Rule 44(5).
[201] Rule 44 para 3(a).
[202] Bürli (n 10 above) 11.

Individuals, NGOs or other interest groups must have 'a perceptible interest in the outcome of a case', if they are to be admitted as *amici curiae*.[203] It must be noted that in terms of article 36(2) of the Convention and Rule 44 of the Court's Rules, decisions on intervention are made by the President of the relevant Section or the President of the Court in Grand Chamber proceedings without external checks for transparency. This discretion is almost absolute.[204]

Usually the case-lawyer dealing with the case on behalf of the Judge Rapporteur prepares a note setting out reasons whether or not leave for intervention should be granted.[205] This note is assessed by the relevant Section Registrar for quality assurance purposes before the President of the Section finally decides.[206] The downside of this arrangement is that the President is under no duty to disclose the identities of the organisations that submitted briefs or give reasons why a particular brief was accepted or rejected.[207] This opacity is untenable in that it creates uncertainty and unpredictability and makes it difficult for putative *amici curiae* to intervene in cases before the Court. Openness in relation to how the President excises his discretion in this regard is the desideratum.

The first request from a non-party to intervene in a case before the European Court was made in 1978 in *Tyrer v UK*.[208] In that case, the National Council for Civil Liberties (NCCL), which had represented the petitioner before the European Commission, requested the leave of the Court to file a written memorandum and oral submissions. The Chamber of the Court turned down the request without explanation.[209] As Lester correctly argues:

> It was a harsh decision in the light of the fact that the NCCL had represented Mr Tyrer before he withdrew his application and his instructions, and that the NCCL's stated purpose was that his initial and unambiguous position should be presented to the Court, whether in its own right,

[203] Van Dijlk (n 199 above) 205.
[204] S Dothan 'Luring NGOs to International Courts: a comment on CLR v. Romania' (2015) 75/3 *Zeitschrift fuer Auslaendisches Oeffentliches Recht und Voelkerrecht* 659.
[205] Bürli (n 10 above) 10.
[206] Ibid.
[207] See L Crema 'Testing *amici curiae* in international law: rules and practice' (2012) 22/1 *Italian Yearbook of International Law* 101. See also N Bürli '*Amicus curiae* as a means to reinforce the legitimacy of the European Court of Human rights' in S Flogaitis *et al The European Court of human rights and its discontents* (2013) 144.
[208] Applications 5856/72, [1978] 2 EHRR 1, Judgment of 25 April1978.
[209] Shelton (n 89 above) 630.

> on behalf of Mr Tyrer's family, as *amicus curiae*, or in such other form as might assist the Court.[210]

The European Court first allowed a third-party intervention in 1979 in *Winterwerp v Netherlands*, albeit indirectly.[211] Following the admission of the UK government in this case through the European Commission, the Court began to receive requests for intervention from NGOs. In 1981, in *Young, James and Webster v UK,*[212] a case dealing with closed union shops, the Court accepted information offered to it by the Trades Union Congress (TUC) acting as an *amicus*. Again, the Court used the indirect admission procedure it adopted in the *Winterwerp* case, noting that the Convention does not make provision for the possibility of third party intervention in the Court's proceedings but that it considered it prudent that TUC might file written observations with the Commission, which if it thought fit could subsequently file them with the Court.[213] The Court added that if such a course were taken, it still remained for it to determine whether and to what extent those submissions would be taken into account.[214]

However, research shows that while the European Court has a fairly extensive *amicus* practice in absolute terms, in relative terms, *amici curiae* have intervened only in few of the proceedings since the inception of the Court in 1959. This development has so far refuted a projection expressed in 1990 by Lester that 'the little practice of [third party interventions before the European Court] will become more widespread and that the Court will actively encourage the use of the new procedure'.[215] This development is perhaps attributable to the fact that there are only a few NGO *amici* in Europe which make repeated appearances in the proceedings of the European Court. These NGOs are drawn from a remarkably limited pool of NGOs, which include: Justice, Amnesty International, Article 19, Interights, Liberty, and Human Rights Watch, among others.[216]

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[210] Lester (n 192 above) 342.
[211] *Winterwerp v Netherlands*, Application no. 6301/73, [1979] 2 EHRR 387, Judgment of 24 October 1979.
[212] *Young, James & Webster v UK*, 7806/77, 7601/76, (1981) 4 EHRR 38, Judgment of 24 October 1979.
[213] Letter from Registrar of the Court quoted in Shelton (n 89 above) 631.
[214] Ibid.
[215] Lester (n 192 above) 350.
[216] L Hodson *NGOs and the struggle for human rights in Europe* (2011) 33.

One commonality between many of the NGOs that intervene before the European Court is that they are based in the UK.[217] To some, this trend illustrates the fact that 'British NGOs are by far the most prolific public interest interveners'.[218] Indeed, by reason of their frequent appearance before the Court, repeat players possess a vast fund of knowledge of the Court's jurisprudence as well as its procedures.[219] The longer an organisation is involved in litigation, the more it becomes successful. Lindblom points out that briefs submitted by well-established NGOs, such as the aforementioned ones, 'seem to be more seriously considered by the Court.'[220]

Galanter has usefully identified the several advantages that 'repeat organisations' have over 'one shotters' in a legal system, including their enhanced expertise, economies of scale, and their informal relations with institutional actors, among others.[221] However, since 2005 the arena has been increasingly changing with the emergence of NGOs from places such as Brussels, Paris, Geneva and Eastern Europe.[222] By contrast, Bürli notes that a systematic survey of the Court's case law shows that interventions are submitted by a diverse group of organisations. The incontrovertible truth is that the European Court is becoming increasingly receptive to the advisory function of NGOs, as is reflected in the Court's jurisprudence.[223]

Many decisions of this Court contain elaborate descriptions of *amicus* statements submitted by NGOs.[224] These organisations have played a critical role in drawing the attention of the Court to the latest, yet evolving standards of human rights law, comparative jurisprudence and practices. The main objectives pursued by human rights NGOs that are active before the European Court are to challenge national laws, practices and traditions, and also to advance arguments that seek to broaden the

[217] Viljoen & Abebe (n 46 above) 30.
[218] Hodson (n 216 above) 51.
[219] Ibid.
[220] Lindblom (n 66 above) 39.
[221] M Galanter 'Why the "haves" come out ahead: speculation on the limits of legal change' (1974) 9/1 *Law and Society Review* 99 -100.
[222] H Krieger 'The conference of International Non-Governmental Organisations of the Council of Europe' in S Schmahl & M Breuer (eds) *The Council of Europe: its law and policies* (2017) 339.
[223] RA Cichowski 'The European Court of Human Rights, *amicus curiae*, and violence against women (2016) 50/4 *Law & Society Review* 890.
[224] A-K Lindblom 'Non-Governmental Organisations and non-state actors in international law' in B Reinalda (ed.) *The Ashgate research companion to non-state actors* (2011) 157.

interpretation given to rights guaranteed by the European Convention.[225] Shelton observes that:

> Because [NGOs] intervene in the more important cases before the plenary Court, where there is no clear precedent and where the Court may be divided, they fulfil a role of assisting the Court in new areas of law where the impact is particularly broad. They provide comparative law analysis and practical information that the parties may be unable to marshal and the Court would otherwise be unable to acquire, thus facilitating the decision-making process.[226]

Research also shows that in the early days, the European Court predicated its conclusions on the existence or otherwise of European consensus on these comparative materials supplied, *inter alios*, by NGOs acting as *amici curiae*.[227] The European Court has also used third party interventions to produce comprehensively reasoned decisions when creating new principles and doctrines such as regional consensus and when dealing with complex cases.[228] NGOs before the European Court see the *amicus* procedure as a distinct opportunity to assist in the development of an assertive human rights jurisprudence, which would not only be relied on by the Court in future, but would also everberate throughout world.[229]

3.3.6 The Inter-American Commission and the Court

From the literature surveyed, it appears that the Inter-American Commission first discussed the question of *amicus* participation in its proceedings in 2002 in its Annual Report, but this was never formally codified in the Rules of Procedure in force at the time.[230] Even in the Inter-American Commission's new Rules, which came into force in 2013,[231] the *amicus* procedure is not explicitly provided for. In the 2003 case of Mary

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[225] L van den Eynde 'An empirical look at the *amicus curiae* practice of human rights NGOs before the European Court of Human Rights (2013) 31/3 *Netherlands Quarterly of Human Rights* 297.
[226] Shelton (n 89 above) 638.
[227] K Dzehtsiarou 'Does consensus matter? legitimacy of European consensus in the case of the European Court of European Rights' (2011) 12/3 *Public Law* 549.
[228] Bürli (n 207 above) 137.
[229] See generally, RA Cichowski 'Civil Society and the European Court of Human Rights' in J Christofferson & R Madsen (eds)*The European Court of human rights between law and politics* (2011) 88.
[230] Lindblom (n 66 above) 350.
[231] Approved by the African Commission at its 137th regular period of sessions, held from 28 October to 13 November 2009, and modified on 2 September 2011 and during the 147th Regular Period of Sessions, held from 8 to 22 March 2013. Came into force on 1 August 2013.

& Carrie Dann v US,[232] involving numerous *amicus curiae* NGOs and individuals, the Inter-American Commission pointed out that:

> After having reviewed the requests for intervention set forth above and the related *amici* briefs, the Commission considered that they essentially reiterated arguments already presented by the petitioners and accordingly did not require further processing in these proceedings.[233]

Lindblom correctly points out that despite the fact that the Commission did not consider the briefs filed in the case, the above passage shows that the Commission has the requisite capacity to receive and consider *amicus* briefs in appropriate circumstances.[234] However, she notes that in practice, the *amicus* practice of the Inter-American Commission is negligible.[235] She goes on to point out that possible reasons for the scarce NGO participation as *amici curiae* before the Commission include: (a) the lack of an explicit legal basis for intervention in the Commission's Rules of Procedure; (b) the confidential nature of the communications procedure of the Commission, as NGOs may not be aware of cases suitable for intervention that are pending before the Commission; (c) the fact that NGOs often join proceedings as petitioners and co-petitioners, positions that are relatively stronger than that of *amicus curiae*.[236]

The Inter-American Court entertains *amicus* interventions in both contentious and advisory proceedings.[237] The Inter-American Court originally admitted *amici curiae* in virtually all its proceedings without explicit authorisation from the Inter-American Convention, its Statute or Rules of Procedure.[238] A Former President of this Court, Thomas Buergenthal referred to article 34(1) of the 1980 Court's Rules of Procedure

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[232] OEA/Er.l/V/II.117, Annual Report of the Inter-American Commission of Human Rights 2002, Report no. 75/02, Decision of 7 March 2003,
[233] Ibid. para 34.
[234] Lindblom (n 66 above) 350. See also M Schachter 'The utility of pro bono representation of U.S.-based *amicus curiae* in non-US and multi-national courts as a means of advancing the public interest' (2004) 28/1 *Fordham International Law Journal* 112.
[235] For a discussion on some of the notable cases where the Commission received *amicus* briefs, see Lindblom (n 66 above) 350 – 354.
[236] Ibid. 354.
[237] D Shelton 'The jurisprudence of the Inter-American Court of Human Rights' (1994) 10/1 *American University International Law Review* 348.
[238] Ibid.

as the possible basis for the Court's early *amicus* practice.[239] The said article 34(1) provided that, '[t]he Court may, at the request of a party or the delegates of the Commission, or *proprio motu,* decide to hear as a witness, expert, or in any other capacity, any person whose testimony or statements seem likely to assist it in carrying out its function.' Although the relevance of this provision appeared to be limited to contentious proceedings, its application was extended to advisory proceedings by virtue of article 53 of the Court's Rules of Procedure.[240]

Further, article 34(2) thereof also provided that the 'Court may … entrust anybody, office, commission or authority of its choice with the task of obtaining information, expressing an opinion, or making a report upon any specific point.' This further suggests the acceptability of third party participation in the Court's proceedings. Since the latter rule authorised the Court to hear individuals whose statements might help it in carrying out its adjudicatory functions, it can therefore be argued that it implicitly entitled the Court to receive *amicus* briefs.[241] Following a series of amendments, in November 2009, the Court promulgated its revised Rules, which expressly authorise the Court to entertain *amicus* briefs. According to the definitional article 2(3) thereof:

> The term "*amicus curiae*" refers to the person who is unrelated to the case and to the proceeding and who submits to the Court a reasoning about the facts contained in the application or legal considerations over the subject-matter of the proceeding, by means of a document or an argument presented in the hearing.[242]

The involvement of *amici curiae* before the Inter-American Court is governed by Rule 44 of this body's Rules of Procedure. This Rule addresses questions such as who may file (anyone);[243] the manner of filing (regular mail or electronic);[244] and when such filing must occur (15 days from the date of hearing or 15 days from the Court's scheduling order requesting final submissions, while original briefs and/ or annexes electronically

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[239] T Buergenthal 'The advisory practice of the Inter-American (1985) 79/1 Human Rights Court' *American Journal of Internal Law* 15. See also S Davidson *The Inter-American human rights system* (1997) 147.
[240] Article 53 provided that '[w]hen the circumstances require, the Court may apply any of the Rules governing contentious proceedings to advisory proceedings'.
[241] Buergenthal (n 239 above) 15.
[242] Added by the Court during its LXXXII Ordinary Period of Sessions, in the session held on 29 January 2009.
[243] Rule 44(1).
[244] Rule 44(2).

transmitted must be received by the Court Registry within 7 days from the date of dispatch).[245] This Rule also makes it clear that *amicus* briefs can be submitted in respect of proceedings for compliance with and the monitoring of decisions and those relating to provisional measures.[246] In relation to formal requirements, the provision prescribes that the brief must bear the name and signature of the *amicus* and be written in the working language of the case.

Rule 44 also indicates that the briefs will be transmitted to the record parties for their consideration, and to enable them to reply if so minded. In addition to the filing of briefs, the Inter-American Court also permits *amicus* intervenors to participate in oral submissions.[247] Despite the fact that this Court boasts one of the most comprehensive *amicus* regulatory regimes in the international judiciary, the 15-day period allowable for the filing of *amicus* briefs following the public hearing is too short to allow for any meaningful reflection on the issues and preparation of submissions.[248] There appear to be at least two possible solutions to this problem: first, intervening individuals and NGOs must prepare their submissions well in advance, if possible; or, second and more importantly, the Court must consider extending the 15-day timeline to allow *amici curiae* sufficient opportunity to prepare well-researched arguments to address the issues raised at the hearing.[249]

It is also important to note that in terms of the afore-cited Rule 44, any NGO filing a petition or brief before the Inter-American Court must be recognised under the laws of one or more members of the Organisation of American States (OAS). In terms of the praxis of the Court, this limitation does not appear to pose any significant challenge to the involvement of NGOs in its litigation.[250] This is presumably because it is naturally the NGOs created in terms of the domestic laws of the countries in the Americas that demonstrate interest in the enforcement of the Inter-American Convention by intervening as *amici curiae*.[251] It is also important to note that a prior request for

[245] Rule 44(2) & (3).
[246] Rule 44(3).
[247] Rule 44(1) & (3).
[248] AU De Torres & L Burgorgue-Larsen *The Inter-American Court of Human Rights: case law and commentary* (2011) 49.
[249] Ibid.
[250] Ibid.
[251] Ibid.

authorisation to intervene in the litigation of the Inter-American Court is not required: the act of filing a submission is considered a sufficient request.[252]

Further, the Rules of the Inter-American Court do not impose any comparable conditions for intervention, such as the 'interest of the proper administration of justice' as required in the European system or any comparable standard. This means, at least theoretically, that the Inter-American Court is less strict in filtering *amicus* briefs. However, operationally, nothing prevents the Court from rejecting a brief that is unhelpful in the determination of a case even if the Court's Rules are silent on this aspect.[253] In this connection, Moyer points out that despite the silence, the Court should be entitled to reject a brief that is dominated by political viewpoints and lacks juridical content.[254] It must be added that a brief that contains both political and legal perspectives must be admitted for its legal content.[255]

For the sake of clarity and certainty, it is preferable that circumstances in which the briefs are to be accepted or rejected should be expressly laid down. In terms of practice, the Inter-American Court is considered as the poster child of *amicus* participation, having received about 500 *amicus* briefs within its first 35 years of existence.[256] This figure is exceptionally huge given the fact that the Court rendered only about 275 judgments and decisions in contentious cases, and twenty advisory opinions in that period.[257] This means that in its contentious proceedings, the Court received more briefs from *amicus* intervenors than from record parties.[258]

Pasqualucci observes that *amici curiae* present the Inter-American Court with alternative legal theories, viewpoints and perspectives in cases involving a high level of public interest, thereby influencing the creation and development of international

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[252] Crema (n 207 above) 100.
[253] For a comparable view, see Moyer (n 33 above) 113.
[254] Ibid.
[255] Ibid.
[256] FJR Juaristi 'The *amicus curiae* in the Inter-American Court of Human Rights (1982 – 2013)' in Y Haeck *et al The Inter-American Court of Human Rights: theory and practice, present and future* (2015) 104. See also S Khoury & D Whyte *Cooperate human rights violations: global prospects for legal action* (2016) 121.
[257] Ibid. 104.
[258] Ibid.

law norms in the Americas.[259] The former Deputy Executive Secretary of the Inter-American Court reports that 'Judges of the Inter-American Court have told me that the *amici curiae* have provided invaluable contributions to the Court's deliberations and judgments.'[260] The judges in San José acknowledge that the cases that they handle are so much in the public interest that it is absolutely necessary to receive all shades of views from the *amicus curiae*, so that their decisions can be integrative and broad based.[261] In *Kimel v Argentina*[262] the Inter-American Court pointed out that:

> *Amici curiae* briefs are filed by third parties which are not involved in the controversy but provide the Court with arguments or views which may serve as evidence regarding the matters of law under the consideration of the Court. Hence, they may be submitted at any stage before the deliberation of the pertinent judgment. Furthermore, in accordance with the usual practice of the Court, *amici curiae* briefs may even address matters related to the compliance with judgment. On the other hand, the Court emphasizes that the issues submitted to its consideration are in the public interest or have such relevance that they require careful deliberation regarding the arguments publicly considered. Hence, *amici curiae* briefs are an important element for the strengthening of the Inter-American System of Human Rights, as they reflect the views of members of society who contribute to the debate and enlarge the evidence available to the Court.'[263]

From the aforesaid passage, the Court acknowledged that *amici curiae*: (a) may not be embedded in the controversy unfolding before the Court; (b) may supply the Court with opinions or factual perspectives which serve as evidence regarding questions of law that fall for determination before the Court; (c) may lodge their briefs at any stage of the proceeding before the delivery of judgment; (d) may get involved in proceedings dealing with the question of compliance with the Court's decisions; (e) may serve as a conduit insofar as they draw the attention of the Court to shifting public opinion upon matters of public interest that have been brought before the Court.

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[259] J M Pasqualucci *The Practice and procedure of the Inter-American Court of Human Rights* (2003) 75. See also CM Bailliet 'The strategic prudence of the Inter-American Court of Human Rights: rejection of requests for an advisory opinion' (2018) 15/1 *Brazilian Journal of International Law* 256 – 257.
[260] D Padilla 'The Inter-American Commission on Human and Peoples' Rights of the Organisation of American States' (1993) 9/1 *American University Journal of Law & Policy* 111.
[261] Úbeda de Torres & Burgorgue-Larsen (n 248 above) 49.
[262] IACtHR, (Ser C) no. 177 [2008], Judgment of 2 May 2008.
[263] Ibid. para 16. See also *Castañeda Gutman v Mexico*, Preliminary Objections, Merits, Reparations and Costs, IACtHR (Ser C) no. 123 [2005], para 14, Judgment of 6 August 2008.

3.4 Interim conclusion

In this chapter, it has been shown that although the *amicus* institution has its historical antecedents in domestic law, it has become a staple in cases before international courts and tribunals, especially those dedicated to the enforcement of human rights.[264] Although it would be an overstatement to speak of the *amicus curiae* as an institution hallowed by 'international rules of procedure,' the above analysis demonstrates that the *amicus* procedure is given expression in the governing instruments of a number of international courts and tribunals.[265] The chapter also reveals that there is no common *amicus curiae* regime in the international field. The evolution of the *amicus curiae* in international law is uneven, uncoordinated and unsystematic across dispute settlement regimes.

Different international courts and tribunals have adopted different modalities of dealing with *amicus* briefs. This therefore means that, such procedural issues 'can in practice only be pursued on a tribunal-by-tribunal basis.'[266] The Chapter also shows that international courts exhibit different attitudes towards the admission of *amici curiae*. While interstate dispute settlement mechanisms such as the ICJ and the ITLOS remain largely conservative and reticent towards admitting *amicus* briefs and the WTO bodies too cautious, whereas international criminal courts and regional human rights courts and compliance bodies maintain an open-door policy towards *amicus* intervenors.

Overall, although the pattern of involvement of *amici curiae* in international litigation is relatively incoherent and not linear, its trajectory is unmistakably clear: with the increased involvement of non-state actors in the international arena, this trend is likely to continue.[267] However, at this stage, the actual impact of the participation of *amici curiae* in the case outcomes of international courts and tribunals generally remains marginal, with the exception of regional human rights adjudicative bodies which have

[264] CA Bradley & JL Goldsmith, III 'Current illegitimacy of international human rights litigation' (1997) 66/2 *Fordham Law Review* 345.
[265] Bartholomeusz (n 118 above) 237.
[266] A Watts 'Enhancing the effectiveness of procedures of international dispute settlement' (2001) 5 *Max Planck Yearbook of United Nations Law* 21.
[267] Bartholomeusz (n 118 above) 285.

demonstrated the usefulness of *amicus* submissions in reaching well-reasoned and accurate decisions.[268]

[268] Shelton (n 89 above) 640.

CHAPTER 4

THE REGULATORY FRAMEWORKS FOR *AMICUS* PARTICIPATION

4.1 Introduction

This chapter presents a pragmatic examination of and critical reflection on the efficacy of the *amicus* regulatory regimes of the African Commission, the African Court and the African Children's Committee. As seen in Chapter 2, the admission of a non-party to a proceeding before an international court or tribunal is anathema to the bilateralist structure of the international judicial dispute settlement process. To bypass this bilateralism, and accommodate public interest, it is necessary for these bodies to develop sufficiently expansive, liberal and comprehensive rules for the regulation of *amici curiae*. The public interest would be effectively served by relaxing rather than tightening the rules governing the admission of *amicus* intervenors.[1] Efforts aimed at restricting rather than encouraging greater *amicus* participation through maintaining an 'open door policy' should be approached with circumspection.[2]

Until recently, the participation of *amicus curiae* in international litigation was infrequent and sporadic, making it less pressing to put in place any comprehensive regulatory framework for this phenomenon. By contrast, and as seen in Chapter 3, the involvement of *amici curiae* in international litigation, particularly before regional human rights bodies and international criminal courts now occurs as a matter of routine. Although the *amicus* practice before the interpretive organs of the African human rights system remains modest, a survey of relevant decisions by these bodies indicates that there has been a gradual but perceptible increase in the involvement of NGOs and other organised interests that act as *amici curiae* before these bodies in recent years.[3] This makes the call for a comprehensive regulation of *amicus* participation process in this system as timely as it is urgent.

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[1] FB Wiener *Briefing and arguing federal appeals* (2001) 270. See also A Borovoy **'**Interventions and the public interest' in FL Morton *Law, politics and judicial process in Canada* (2002) 291.
[2] OS Simmons 'Picking friends from the crowd: *amicus* participation as political symbolism' (2009) 42/1 *Connecticut Law Review* 192.
[3] This shall become evident in the course of the present chapter and the chater that follows.

Indeed, Zengerling has urged other regional human rights courts and tribunals to emulate the Inter-American Court not only by codifying the *amicus* procedure but also by striving for a regulation that comprehensively provides for the conditions and circumstances for *amicus* intervention in their litigation to enhance the effectiveness of the *amicus* instrument, among other things.[4] Similarly, as has been observed in relation to the use of *amici* in arbitration disputes: 'it may be necessary to formalize their status rather than leaving the possibility of participation subject to an *ad hoc* process'.[5] As Crema points out, '[t]he lack of clear rules is a critical feature for an instrument that should enhance the public's right of participation in a trial'.[6]

It is argued that a comprehensive regulatory framework for the participation of *amici curiae* before African human rights judicial and quasi-judicial tribunals will assist the bodies under analysis to carefully balance the benefits associated with intervention as against the inconvenience, expense and delay which may sometimes be occasioned by a third party to the disputing parties.[7] A specifically tailored regulatory regime for *amicus* participation becomes all the more important given the fact that *amici curiae* are usually not subject to or bound by the same rules that govern the principal parties in litigation.

The notion of regulating private participation in international proceedings also comports with the formalism that is inherent in the very nature of the judicial process.[8] At the moment, there are disjointed, incoherent and deficient *amicus* regulatory regimes that lack common legal standards across different African human rights jurisdictional frameworks. The lack of comprehensive rules setting out specific criteria for *amicus* intervention is a shame given that *amicus* briefs are beginning to be relied upon in the African human rights system as demonstrated in the next chapter.

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[4] C Zengerling *Greening International jurisprudence: Environmental NGOs before international courts, tribunals, and compliance committees* (2013) 116. See also R Mackenzie 'The *amicus curiae* in international courts: towards common procedural approaches' in T Treves *et al* (eds) *Civil society, international courts and compliance bodies* (2005) 304.
[5] E Levine '*Amicus curiae* in international investment arbitration: the implications of an increase in third-party participation' (2011) 29/1 *Berkeley Journal of international Law* 222.
[6] L Crema 'Testing *amici curiae* in international law: rules and practice' (2012) 22/1 *Italian Yearbook of International Law* 123.
[7] L Vierucci 'NGOs before international courts and tribunals' in P-M Dupuy & L Vierucci (eds) *NGOs in international law: efficiency in flexibility?* (2008)169.
[8] Ibid. 169.

4.2 Regulating 'friends of the court': conceptual underpinnings

Generally, the regulation of the participation of civil society in international litigation takes two forms: informal and formal regulation. The former concerns self-regulation by NGOs. These entities are increasingly resorting to codes of ethics and conduct to provide standards of behaviour for action or conduct.[9] Since no such codes appear to have been adopted to specifically guide NGOs in international litigation, this aspect will be discussed no further here. Formal regulation dealing with the modalities of private participation in international litigation can also be subdivided into forms: legislative and judicial.

Regarding legislative regulation, the framers of the constituent instrument of an international court or tribunal may include in such an instrument the possibility for civil society participation before such a court or tribunal. The shortcomings associated with legislative regulation cannot be overlooked. Usually, rules adopted through this process are difficult to modify because the amendment procedure of a treaty often requires onerous majorities which are not easy to secure.[10] Moreover, the heteronomous origins of such rules exacerbate the concerns that the interests of NGOs and other private interest groups are not safeguarded.[11] These concerns may have implications for the legitimacy of the tribunal concerned. It is for these reasons that the field under consideration is characteristically and predominantly regulated by the judicial authority as opposed to rules of positive law.[12]

The notion that judges are the makers of rules of procedure covers two distinct but related functions: the quasi-legislative and the judicial. As regards the quasi-legislative function, it must be noted that the procedural law of international courts and tribunals is largely a genius of their own making.[13] These institutions may be empowered to formulate their own rules of procedure.[14] Indeed, the constitutive acts of the African

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[9] Ibid. 169.
[10] Ibid. 172.
[11] Ibid.
[12] Ibid. 173.
[13] A von Bogdandy & I Venzke 'In whose name? an investigation of international courts' public authority and its democratic justification' (2012) 23/1 *European Journal of International Law* 25. See also R Kolb 'General principles of procedural law' in A Zimmermann *et al* (eds), *Statute of the International Court of Justice: a commentary* (2006) 795.
[14] CPR Romano 'A taxonomy of international rule of law institutions' (2011) 2/1 *Journal of International Dispute Settlement* 252.

Commission, the African Court and the African Children's Committee authorise these bodies to do so.[15] Such provisions can be seen as delegating to international courts and tribunals the authority to formulate and develop rules on *amicus* participation, and to respond to related procedural issues arising from cases, on an *ad hoc* basis.[16] These rules of procedure add flesh to the otherwise skeletal, laconic or nebulous statute of a tribunal.[17]

It must be noted that the rules of procedure of international courts and tribunals are framed by these bodies themselves without the need for subsequent ratification by the states parties to be operative.[18] Indeed, the procedural rule-making capacity of international courts and tribunals is considered as an inherent feature emanating from the need to ensure that judicial bodies are sufficiently equipped to autonomously manage their functions.[19] There is an established view that judicial function involves the resolution of disputes as well as the sound administration of justice.[20] In other words, the inherent or generic powers of international courts and tribunals derive from the juridical nature of the adjudicative process. According to Sorel:

> Self-regulation is the prevailing system, which implies mutability of the rules of procedure within the framework of the statute. This is an important source of independence and one of the ways in which such a creature may escape its makers.[21]

With specific reference to *amicus* regulation, Shelton argues that 'the *amicus* and other forms of third party participation developed through the exercise of the inherent power of a court of law to control its processes.'[22] She adds that all courts probably have 'the

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[15] African Charter, article 42(2), African Court's Protocol, article 33; African Children's Rights Charter, article 38(1).
[16] For a similar point, see CE Foster *Science and the precautionary principle in international courts and tribunals: expert evidence, burden of proof and finality* (2011) 198.
[17] Ibid.
[18] C Brown *A common law of international adjudication* (2007) 125.
[19] JL Simpson & H Fox International arbitration (1959) 147. See also J Sztucki *Interim measures in The Hague Court* (1998) 63.
[20] Brown (n 18 above) 72-78.
[21] J-M Sorel 'International courts and tribunals, procedure' in R Wolfrum (ed.) *Max Planck Encyclopedia Public International Law* (2009) mn1.
[22] D Shelton *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, (1994) 88/4 *American Journal of International Law* 617. See also *Loayza Tamayo v Peru* (Merits) Judgment 17 September 1997, IACtHR (Ser C) no. 33, [1997], para 33, Judgment of 17 September 1997. See also *Yamata v Nicaragua* (Preliminary exceptions, Merits, Reparations and Costs), IACtHR, (Series C) no. 127 [2005], para 120, Judgment of 23 June 2005; *Acevedo Jaramillo v Peru* (Preliminary Objections, Merits, Reparations and Costs) IACtHR, Series C no. 144, [2006], para 62, Judgment of 7 February 2006.

inherent power to request anyone to assist their deliberations or to refuse volunteers.'[23] In some cases, courts use inherent powers to jurisprudentially complement rudimentary procedural rules and ensure the optimal function of the court.[24] In this regard, a court or tribunal gives a liberal interpretation to a relevant provision or rule with the aim of bridging a gap left in the adjudicative body's statute or rules of procedure. The Rules of Procedure of the African Commission[25] state that '[i]n the absence of a provision in these Rules or in case of doubt as to their interpretation, the Commission shall decide.'[26] Courts and tribunals interpret procedural principles in a manner that creates procedural precedents, which is purely a judicial function.[27]

Another school of thought posits that the rule-making power of international courts and tribunals is not inherent, but can rather be implied from the constitutive texts of international adjudicative organs in much the same fashion as the powers of international organisations can be implied from their constituent instruments.[28] According to this view, international interpretive organs are impliedly ascribed the power that is necessary to undertake their adjudicatory tasks on the same theoretical basis as other international organisations created by states.[29] However, there are very rare instances in which international courts and tribunals have invoked this implied doctrine to establish their power.[30] It is important to note, however, that in formulating

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[23] Shelton, Ibid. 617.

[24] A Wiik *Amicus curiae participation before international courts and tribunals* (2018) 178; See also *Mavrommatis Palestine Concessions* case, PCIJ Reports 2 (1924) 16, Judgment of 30 August 1924. In this case, the PCIJ stated that where a fitting rule of procedure does not exist, it is allowed to 'adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.' See also *Northern Cameroons (Cameroon v UK)* ICJ Reports (1963), Judgment 2 December 1963, Separate Opinion of Judge Fitzmaurice 103; *Nuclear Tests* Case (*Australia v France*) ICJ Reports (1974) 259 – 2260, Judgment 20 December 1974.

[25] Adopted by the African Commission on Human and Peoples' Rights during its 47th ordinary session held in Banjul, the Gambia from 12 - 26 May 2010.

[26] Rule 1(2) thereof.

[27] K de Meester 'Initiation of investigation and selection of cases' in G Sluiter *et al International criminal procedure: rules and principles* in G Sluiter *et al International criminal procedure: principles and rules* (2013) 69.

[28] P Gaeta 'Inherent powers of international courts and tribunals' in LC Vohrah *et al* (eds) *Man's inhumanity to man: essays on international law in honor of Antonio Cassese* (2003) 362.

[29] Foster (n 16 above) 198. See also *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949 ICJ Reports 182-4, where the Court stated that '[u]nder international law, the organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties … the rights and duties of an entity such as the organisation must depend upon its purposes and functions as specified or implicit in its constituent documents and developed in practice.'

[30] Foster, Ibid. 198.

new rules, international adjudicatory bodies should act within the parameters of their enabling statutes.[31]

4.3 *Amicus* rules of the African judicial and quasi-judicial bodies

This part discusses and assesses the *amicus* regulatory regimes of the bodies under review. The hypothesis is that despite the numerous differences between the African human rights jurisdictional fora, a number of common standards can be identified. However, an unqualified and absolute uniformity in approach that can be established through a fully converged set of procedural norms for *amicus* participation to be applied to all the African adjudicatory bodies under consideration without exception is neither possible nor desirable, given the jurisdictional peculiarities of these bodies. Because the institutions under analysis are different, each institution may be best placed to figure out how to govern its own *amicus* procedure. The truest strength of the *amicus* device is its flexibility which allows it to criss-cross between jurisdictions without losing its essence and character. It thus allows tribunals to adapt it to their own needs.[32]

4.3.1 The African Commission's *amicus* regime

The African Charter (which is the constitutive instrument of the Commission) is silent on *amicus* participation before this body or before any other organ, for that matter. However, some of the provisions of this instrument can be creatively read as permitting the involvement of *amici curiae* in the litigation of claims founded on its provisions. For instance, article 46 thereof provides that the Commission may 'resort to any appropriate method of investigation,' that includes the authority to 'hear from the Secretary General of the AU or *any other person* capable of enlightening it.'[33] In addition, article 52 of the Charter empowers the Commission to receive information it considers useful to determine a pending case from the 'states concerned *and from other sources'* (emphasis added).

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[31] Ibid.
[32] Wiik (n 24 above) 172.
[33] Article 46 of the African Charter. See also R Mackenzie *et al The manual on international courts and tribunals* (2010) 404 – 405.

Indeed, the afore-cited provisions have been inventively construed by writers to mean that the Commission has the capacity to admit NGOs and individuals as *amici curiae* in its proceedings.[34] However, the initial Rules of Procedure of the Commission adopted in 1988 and subsequently amended in 1995 did not make provision for *amicus* intervention. Rule 119 thereof, governing non-state complaint procedures, did not mention *amicus* intervention but referred solely to the briefs of the complainant(s) and the respondent state.[35] Nevertheless, the author of the communication was informed of the Commission's decision on admissibility and served with the pleadings of the respondent state, and was at liberty to solicit the assistance of an NGO that was not previously involved in the case.[36]

With the coming into effect of its 2010 Rules of Procedure, the African Commission for the first time claimed the authority to admit unsolicited briefs and also to invite *amicus curiae* interventions in proceedings before it. Rule 99(16) explicitly states that '[t]he Commission may receive *amicus curiae* brief on communication.' It further states that '[d]uring the hearing of a communication in which *amicus curiae* brief has been filed, the Commission, where necessary shall permit the author of the brief or the representative to address the Commission.' This provision shifted the debate on the participation of *amici curiae* before the Commission from whether or not this body has the capacity to admit *amicus* briefs to the conditions for the admission of such briefs.

It is noteworthy that Rule 99(16) also affords *amici curiae* the right to oral participation before the Commission, which is denied to them in many international jurisdictions. For instance, the Inter-American Court has not been similarly open to *amici* curiae who seek to participate in the oral hearing of contentious cases brought before it. In the context of the European Court, participation by *amici curiae* is usually limited to written submissions.[37] Friends of the court may participate in a hearing before this Court in

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[34] For instance, see CA Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: the development of its non-state communication procedures' (1998) 20/2 *Human Rights Quarterly* 279. See also LH Mayer ' NGO Standing and Influence in Regional Human Rights Courts and Commissions (2011) 36/3 *Brooklyn Journal of International Law* 921.

[35] Amended Rules of Procedure of the African Commission on Human and Peoples' Rights, adopted on 6 October 1995.

[36] Rules 118(1) and 119(3) of 1995 Commission's Rules.

[37] *McGinley and Egan v UK*, Application no. 10/1997/794/995-996 (1999) 27 EHRR 1, Judgment of 9 June 1998. See also L Bartholomeusz 'The *amicus curiae* before international courts and tribunals, non-state actors and international law' (2005) 5/3 *Non-State Actors and International Law* 240.

exceptional cases only.[38] The discretion to allow oral participation seems to be guided by the constitutional importance of the issue.[39] Hodson correctly argues that given the fact that oral submission is an important tool for an advocate, an overly circumscribed or restrictive approach in this regard has the potential to reduce the impact of the submissions.[40]

Rule 85 of the Commission's Rules of Procedure is also instructive. It provides that: '[t]he Commission may decide to solicit or accept interventions by parties other than the Complainant and the Respondent State that it considers could provide it with information relevant to making a decision on a Communication.' Rule 99(8) thereof similarly authorises the Commission to admit states parties to the African Charter, Chairperson of the AU Commission (the administrative organ of the AU, and not the Banjul Commission), affiliate institutions, and observers or *any other person* as provided for in terms of article 46 of the African Charter to make submissions during the oral hearings in the individual complainant procedure.

Rule 100 (1) also bears some striking relevance to the *amicus* procedure inquiry. It provides that the Commission shall determine *proprio motu*, or at least at the request of one or more of the parties, to call independent experts in a suit. It proceeds to provide that the Commission will not refuse a request from such experts unless there are weighty countervailing reasons to do so. NGOs, both African-based and international, are not precluded by this rule or any provision in the governing statutes of the African Commission from proffering expert testimony to the Commission, and their possibilities therefore would depend, by and large, on the Commission's need for additional information in determining the case at hand.

However, it appears that to date, the Commission has not exercised its power to solicit assistance from NGOs. A number of reasons may account for this. Commissioner Dersso is of the opinion that the reluctance of the Commission to do so may be on the basis that the Commission does not want to deepen the cynical perception by states that its agenda has been hijacked by civil society and that it has therefore lost its

[38] See Rule 44 (2)(a) of the European Court's Rules of Procedure.
[39] D Shelton 'The jurisprudence of the Inter-American Court of human rights' (1994) 10/1 *American University International Law Review* 350.
[40] L Hodson *NGOs and the struggle for human rights in Europe* (2011) 54.

autonomy.[41] As an antidote to perceptions of its lack of autonomy, it is advisable for the Commission to send out general public calls for *amicus* interventions, through a process akin to the one in which it uses to call for applications from the public for membership of its special subsidiary mecahnisms.[42] Such an approach will allow it to identify specific questions or aspects of the law upon which it needs assistance. It is not necessary for the Commission to reveal the communication to which its request for assistance relates.

However, Killander and Abebe correctly point out that the *amicus* procedures before the African Commission carry little promise since the confidentiality of the communication process of this body articulated in article 59 of the African Charter is still in place and has yet to be overcome.[43] This provision, which provides that 'all measures taken' by the Commission in exercise of its functions shall remain confidential, has been broadly construed to include all information relating to individual communications.[44] The Commission's Rules of Procedure repeat the approach to confidentiality before the Commission. Rule 31(3) & (4) states that:

> The Commission shall ensure the confidentiality of all case files, including pleadings. This provision shall not be interpreted to prohibit the prompt sharing of pleadings with the parties to a Communication.
>
> The Chairperson of the Commission may communicate to the public general information on deliberations in Private Sessions, subject to the exigencies of Article 59 of the Charter and any special directions by the Commission.

[41] Interview with Commissioner, Solomon Dersso, 20 October 2017. For a contrary view, see R Murray *The African Commission on Human and Peoples' Rights and International Law* (2000) 94.

[42] For instance, see Call for Applications for the Nomination of Expert Members of the Working Group on Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa, 17 February 2014. Call for Applications for the Nomination of Expert Members to serve on the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa, 24 March 2011.

[43] M Killander & AK Abebe 'Human rights developments in the African Union during 2010 and 2011' (2012) 12/1 *African Human Rights Law Journal* 213; CA Odinkalu & C Christensen (n 34 above) 279. See also Mayer (n 34 above) 921.

[44] F Viljoen 'A human rights court for Africa, and Africans' (2004) 30/1 *Brooklyn Journal of International Law* 16; GW Mugwanya 'Realizing universal human rights norms through regional human rights mechanisms: reinvigorating the African system' (1999) 10/1 *Indiana International and Comparative Law Review* 49; M Killander 'Confidentiality versus publicity: interpreting article 59 of the African Charter on Human and Peoples' Rights' (2006) 6/2 *African Human Rights Law Journal* 578. See further, OC Okafor *The African human rights system: activist forces and international institutions* (2007) 83.

While the confidentiality approach of the Commission has been said to be necessary since that 'it is expected that the Commission will inspire more confidence and gain the cooperation of states through quiet diplomacy rather than conduct its proceedings in the glare of publicity',[45] it remains a major impediment for *amicus* participation as it forecloses potential *amici curiae* from accessing case information. Indeed, provision for *amicus* submissions raises questions about what access *amicus curiae* (or prospective *amicus curiae*) should be allowed to pleadings and other case documents such as transcripts, witness statements, reports and other related materials.[46]

In addition, because the complaints procedure of the Commission is confidential, the Commission does not generally publicise information (including the subject matter of the claim) on communications pending before it. It only indicates in its activity reports that it has been seized of a particular case.[47] One former legal officer of the Commission states in this regard that:

> It is true that the Commission does not publish a cause list detailing the facts of Communications and it is difficult for potential *amici* to know the cases where intervention is needed. [Further], the Commission does make known to the public all the Communications of which it is seized and the names of the parties. It is left to those interested in intervening to contact the parties to the case in order to get necessary information.[48]

The above concerns are shared by the Legal Director of the Legal Media Defense Initiative, Ms Nani Jansen, who complains that 'currently, there really is no easy way to find out what is pending before the Commission, and therefore to make a decision on whether or not to intervene'.[49] In some cases, the Commission does not even indicate whether or not a communication has been declared admissible. Where a particular communication has been adjudged admissible, the Commission merely reiterates the decision on admissibility without setting out the facts of the case.[50] It is only the complete record of cases and findings on the merits that are published in the activity reports.

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[45] R Murray 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46/2 *International and Comparative Law Quarterly* 414.
[46] Mackenzie (n 4 above) 301.
[47] F Viljoen & A Abebe 'The participation of *amicus curiae* before regional human rights bodies in Africa' (2014) 58/1 *Journal of African Law* 34.
[48] Interview with Tem Fuh Mbuh, former Legal Officer, African Commission, 2 May 2017.
[49] Interview with Nani Jansen, Director of Legal Media Defence Initiative, 2 May 2017.
[50] Viljoen & Abebe (n 47 above) 34.

Therefore, unless potential *amicus* intervenors can catch wind of a certain case which may be of interest to them and contact the authors of the communication, there is very little chance of obtaining case information.[51] This kind of contact between potential intervenors and parties also impacts on the 'independence of the *amici* from the parties, their thirdness, their friendship to the judges'.[52] The point being maintained is that even though the Commission is now expressly empowered to accept *amicus* briefs, the confidentiality or the non-public nature of the complaint procedure of this body makes it extremely difficult for *amici curiae* to contribute helpful and straight-to-the-point submissions. This is on account of the lack of information about the actual legal questions or issues that fall for determination in a given case.

The theoretical possibility of filing *amicus* briefs must be accompanied by a guarantee of access to information upon which a decision as to whether to intervene or not may be based. If *amici curiae* do not know that the principal parties have already canvassed their main concerns there is a great likelihood of the overlap or repetition of arguments.[53] Similar concerns have also been raised in the context of the proceedings before the WTO adjudicatory bodies[54] as well as Inter-American Commission,[55] which are also confidential. Writing in relation to the WTO judiciary, Crema notes that '[t]he problem of confidentiality… comes precisely from the lack of a clear procedure, which incentivizes and rewards contacts with the parties, and not from the nature of *amici* in and of itself'.[56]

In the context of the Inter-American Commission, it has been said that 'NGOs need to rely on information almost exclusively provided by the parties.'[57] In grappling to strike a balance between confidentiality requirements on the one hand and the importance of permitting *amici curiae* to enter the fray of litigation on the other, an arbitration tribunal noted in one case:

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[51] Ibid.
[52] Crema (n 6 above) 130.
[53] FD Simões 'A guardian and a friend? the European commission's participation in investment arbitration' (2017) 25/2 *Michigan State International Law Review* 290.
[54] M Benzing 'Community interests in the procedure of international courts and tribunals (2006) 5/3 *The Law and Practice of International Courts and Tribunals* 405. See also J Pauwelyn 'The use of experts in WTO dispute settlement' (2002) 51/2 *International and Comparative Law Quarterly* 330.
[55] Interview with Viviana Krsticevic, Executive Director of the Centre for Justice and International Law, 14 June 2017.
[56] Crema (n 6 above) 108.
[57] Interview with Viviana Krsticevic, Executive Director of the Centre for Justice and International Law, 14 June 2017.

> In the present instance, it is not possible for the Petitioners to fulfill all the conditions necessary to allow the Tribunal to fully apply this test. The reason for this impossibility is the impact of the confidentiality order contained in Procedural Order No. 3 of the Tribunal. By precluding the release to the public of the documents that detail the facts and legal issues in dispute, the Petitioners cannot now describe the scope of their intended legal submissions, and hence the extent to which the tests set out in Rule 37(2) are fully met. The Rules should not, it is submitted, be interpreted in such a way as to compel Petitioners to meet the tests, or fail to do so, based on pure speculation as to what might be argued. … In this case, the question arises of how to square the issuance of a broad confidentiality order with the exercise of the right of non-parties to apply for status as an *amicus curiae* in a manner that complies with the letter and spirit of the new Rules that apply to this arbitration.[58]

The enervating confidentiality of the African Commission might discourage NGOs from filing *amicus* briefs. In the words of Jansen, 'due to the lack of transparency of the Commission's proceedings, including the lack of communication on the status of a case by the Secretariat, *amici* might perceive submitting a brief as similar to sending it into a black hole.'[59] She laments further that the 'Commission's case hearings and deliberations are conducted in closed sessions … [C]ombine that with very little communication and NGOs will wonder if it is worth the trouble filing a brief as it will make them doubt if it will actually be considered.'[60] To compound accessibility problems, the Commission does not publish a cause list and the dates on which such cases will be heard.[61]

In the Declaration of Principles on Freedom of Expression in Africa,[62] the African Commission itself notes that, '[p]ublic bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.'[63] In line with its own normative imperative, the Commission must devise ways and means by which putative intervenors may access or receive case information. It has been suggested that the Commission should at least, as it has occasionally done, publish summaries of

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[58] *Biwater Gauff (Tanzania) v Republic of Tanzania* Case no. ARB/05/22, 11, Award of November 27, 2006.
[59] Interview with Jansen, n 49 above.
[60] Ibid.
[61] Interview with Lawrence Mute, Vice Chairperson, African Commission, 23 October 2017.
[62] Declaration of Principles on Freedom of Expression in Africa, 32nd Session, 17 - 23 October, 2002, Banjul, The Gambia.
[63] Ibid. para 4(1).

pending cases. In that way, potential *amici curiae* could then identify cases that are of interest to them that the Commission is seized of.[64]

Potential *amici curiae* may then liaise with the parties, especially the complainant(s) to obtain detailed information on the subject matter of the case and decide on whether or not they wish to file *amicus* briefs.[65] It has been generally suggested that in order to ensure that groups intervene as *amici curiae* before international tribunals, internet databases should be created. Such databases should contain information about cases that have been lodged before the tribunal in question or listed for hearing.[66]

Along the same lines, Commissioner Mute proposes that the Commission must publish comprehensive summaries of cases that have been lodged before it on its website to enable interested third parties to decide whether or not to intervene.[67] Similarly, Jansen suggests that once a communication is assigned a case number, 'it should be listed on the Commission website with a brief description of the facts, the relevant articles of the Charter claimed to have been violated, and an indication of the status of the case: communicated, admissibility and merits.'[68]

To avoid breaching confidentiality requirements, the African Commission can redact case information that it elects to share publicly with third parties. In *Piero Foresti, Laura de Carli and Others v South Africa* (the *Foresti* case),[69] the tribunal allowed 'access to those papers submitted to the Tribunal by the Parties that are necessary to enable the [intervening parties] to focus their submissions upon the issues arising in the case and to see what positions the Parties have taken on those issues.'[70] This approach enables the disclosure of 'only the relevant information to understand the central point of a dispute – [but also] preserves the confidentiality of the sensitive data in the case file, while at the same time providing the opportunity for interested subjects to profitably

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[64] Interview with Jansen, n 49 above.
[65] Ibid.
[66] K Sękowska-Kozłowska 'The role of Non-Governmental Organisations in individual communication procedures before the UN human rights treaty bodies' (2014) 5 *Czech Yearbook of International Law* 382.
[67] Interview with Commissioner Mute, n 61 above.
[68] Ibid.
[69] ICSID Case no. ARB(AF)/07/1, Award of 04 August 2010.
[70] *Piero Foresti, Laura de Carli and Others v South Africa*, ICSID Case no. ARB (AF)/07/1, para 28, Award of 4 August 2010.

intervene'.[71] This can be considered as an 'innovative step' in the participation of *amici curiae* in international adjudication.[72]

Viljoen and Abebe suggest that another way through which NGOs could obtain case information, bypassing the confidentiality hurdle, is by regularly checking the Commission's activity reports for cases that the Commission is seized with and then deciding if they should file *amicus* briefs or not.[73] In addition, these authors suggest that the NGO Forum on the participation of NGOs preceding the commencement of the Commission's ordinary sessions should also be utilised as a site in which potential *amici curiae* could exchange information on pending cases.[74] They propose that an agenda item on 'submissions of *amicus curiae* briefs' should become a formal and permanent feature of this Forum.[75] A former legal officer of the Commission, Tilahun, suggests that the Commission should also give regular press releases about new cases so as to afford potential *amicus* volunteers the opportunity to decide whether to intervene or not.[76] This approach has been adopted by some arbitral tribunals, like those established in terms of the Central America-United States Free Trade Agreement (CAFTA).[77]

4.3.2 The African Court's *amicus* regime

The original Draft of the Protocol of the African Court created in Cape Town in 1995 (Cape Town Draft) at a meeting attended by both governments and NGOs, provided for the possibility of *amicus* intervention.[78] Article 23(2) thereof provided that 'the Court may receive written and oral evidence and *other representations* …' and may rely on such information for decision-making (emphasis supplied). The phrase 'other representations' was retained in article 25(2) of the subsequent Draft Protocol prepared at a meeting held at Nouakchott (the Nouakchott Draft) in 1997.[79] Based on the use of the phrase 'other representations,' it can be reasonably inferred that both

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[71] Crema (n 6 above) 115.
[72] Y Caliskan 'Dispute settlement in investment law' in Y Aksar (ed.) *Implementing international economic law: through dispute settlement mechanisms* (2011) 151.
[73] Viljoen & Abebe (n 47 above) 42.
[74] Ibid.
[75] Ibid.
[76] Interview with Mr Samuel Tilahun, Senior Legal Officer, the African Commission, 28 September 2017.
[77] See *Pac Rim Cayman v El Salvador*, ICSID Case no. ARB/09/12. See also *Apotex Inc. v USA* no. ARB (AF)/12/1.
[78] This Draft Protocol is reprinted in C *Heyns Human Rights Law in Africa* (1999) 239.
[79] Ibid 258.

the Cape Town and Nouakchott Drafts of the Protocol provided for the possibility of *amicus* intervention before the African Court.

However, the Final Court's Protocol, which was adopted in Addis Ababa in 1998 omitted the phrase 'other representations' altogether.[80] The reasons for this omission are not given and remain speculative. In terms of article 26(2) of the Final Protocol, '[t]he Court may receive written and oral evidence including expert testimony and shall make its decision on the basis of such evidence.' According to Wachira, the phrase 'expert testimony' in this provision, could be liberally construed to mean, among other things, the submissions produced by experts and other individuals working with victims of human rights violations.[81] Zengerling similarly argues that this provision creates a reasonably broad access for *amici curiae* to intervene in the proceedings of the African Court and to provide it with both written and oral evidence.[82]

However, Viljoen and Abebe correctly note that the language of the aforesaid article 26(2) limits itself to questions of evidence and does not extend to legal contentions or jurisprudential interpretations.[83] They point out that it may be contended that legal questions and matters of interpretation are excluded from the purview of this provision and that they are inapplicable insofar as they are not mentioned in its text.[84] The two authors argue that the expert opinion which the Court's Protocol anticipates, relates to 'evidence' which may be admitted to resolve factual issues.[85]

Although the Court's Protocol is silent on the subject, Rule 45(1) of the Court's Rules of Procedure[86] entitles the Court to admit as an *amicus curiae*, any person or organisation whose 'assertions' or 'statements' may 'assist the Court in carrying out its task.' Similarly, Rule 45(2) thereof authorises the Court to 'ask any person or institution of its choice to obtain information, express an opinion or submit a report to it on any specific point.' The *amicus* procedure of the African Court has further been

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[80] This omission is accounted for in para 42 of the Report of the Second Government Experts Meeting on the Establishment of an African Court on Human and Peoples' Rights, held in April 1997, Nouakchott, Mauritania, which records that 'some phrases in article 25 which were considered unnecessary were deleted.' The Report is reprinted in Heyns, Ibid. 265. See also para 30 of the Report of the Third Government Experts Meeting Enlarged to Include Diplomats, Ibid. 289.
[81] GM Wachira 'African Court on Human and Peoples' Rights: Ten years on and still no justice' (2008) 22. Available at http://www.refworld.org/pdfid/48e4763c2.pdf (assessed 11 December 2015).
[82] Zengerling (n 4 above) 103.
[83] Viljoen & Abebe (n 47 above) 36.
[84] Ibid.
[85] Ibid.
[86] Adopted in 2010. Available at: http://www.african-court.org (accessed 31 June 2016).

clarified through its Practice Directions[87] which are clear in allowing individuals and organisations seeking to act as *amici curiae* to 'submit a request to the Court'.[88] There is no requirement that such organisations or individuals be based in Africa as is the case with the Inter-American system.

Furthermore, in respect to cases brought before the Court by the Commission, the Court may elect to hear the individual or NGO that instituted the case before the African Commission as an *amicus curiae*.[89] However, there is no requirement that the intervening NGO should enjoy observer status with the Commission. The involvement of the victims and their representatives in the proceedings makes pragmatic sense, as it is likely to ensure deeper knowledge of the case, and better access to witnesses and documents.[90] As in the case of the African Commission, the Court allows *amici curiae* to make oral submissions.

In terms of Rule 27(3) of the Court's Rules of Procedure,[91] the Court may hear 'representatives of parties, witnesses, experts, or such other persons as the Court may decide to hear' during the course of oral proceedings. In *Lohé Issa Konaté v Burkina Faso* (the *Konaté* case),[92] the Court allowed two counsel for the intervenors, namely Donald Deya from Pan African Lawyers Union (PALU) and Simon Delaney from Southern African Litigation Centre (SALC) to address the Court for fifteen minutes each. According to Delaney, the oral participation proved to be 'more impactful, persuasive and interactive.'[93]

It is important to note that the African Court accepts *amici curiae* submissions in both contentious and advisory proceedings. The involvement of NGOs and other organised interests in contentious proceedings before the Court, acting as *amici curiae*, is evidently envisaged by the afore-quoted Rule 45 and has also been confirmed by the

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[87] Adopted by the Court at its Fifth Extraordinary Session held in Arusha, Tanzania in 2012. Available at:
http://www.africancourt.org/en/images/Practice%20Directions/Practice%20Directions%20to%20Guide%20Potential%20Litigants%20En.pdf (accessed 17 April 2016).
[88] Ibid. para 42.
[89] Rule 29(3)(c) of the Court's Rules.
[90] F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67/1 *International and Comparative Law Quarterly* 88.
[91] These Rules replace the Interim Rules of Procedure of 20 June 2008, following the harmonisation process of the Court's Interim Rules with those of the African Commission which was undertaken during the joint meetings in July 2009, Arusha, Tanzania, October 2009, Dakar, Senegal and April 2010, Tanzania.
[92] Application no. 04/2013, Judgment of 5 December 2014.
[93] Interview with Attorney, Mr Simon Delaney, 04 June 2018.

Court's subsequent practice, which is discussed in the next chapter. Rule 45 envisages *amicus* participation in the context of a contentious jurisdiction because it uses the language of 'a party'. By contrast, there are no 'parties' in advisory proceedings.[94] It is also important to note that the Court's rules governing its contentious proceedings are *mutatis mutandis* applicable within the context of the Court's advisory jurisdiction.[95]

Regarding advisory proceedings, Rule 69 of its Rules of Procedure states that when the Court receives a request for an advisory opinion, it should transmit it to AU members, the African Commission, and other interested parties, and these bodies are given a deadline of ninety days to file their observations, if any. Rule 70 thereof is also of moment. It empowers the Court to permit 'any interested person' to file written submissions, within the timeline designated by the Court, on legal questions brought to the Court for an advisory opinion.[96] In the *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* (the *SERAP Advisory Opinion*),[97] concerning the question whether or not poverty constitutes a breach of the African Charter, the Court was a beneficiary of *amicus* submissions by the Centre of Human Rights of the University of Pretoria and Amnesty International.

According to the Court's Head of Legal Division, Grace Kakai, this body has developed a practice of transmitting requests for advisory opinions to interested entities, including to NGOs operating in the area of the subject of the advisory opinion which may be desirous of participating in the case by submitting observations.[98] This is because advisory opinions are given in the public interest and therefore require broad-based participation.[99] It can also be assumed that it is considered important that an international tribunal should receive as much information as possible if the advisory opinion is to attract respect from the international community.[100] In addition, there is no need in advisory opinions to be sensitive to party autonomy as in contentious

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[94] S Rosenne 'Some reflections *erga omnes*' in A Anghie & G Sturgess (eds) *Legal visions of the 21st century: essays in honour of Judge Christopher Weeramantry* (1998) 522.
[95] Rule 72 of the Court's Rules.
[96] Ibid.
[97] Case no. 001/2013, Judgment of 26 May 2017.
[98] Interview with Ms Grace Kakai, Head of Legal Division, African Court, 17 May 2017.
[99] AK Abebe & CM Fombad 'Advisory jurisdiction of constitutional courts in Sub- Sahara Africa' (2013) 46/1 *George Washington International Law Review* 95.
[100] A-K Lindblom *Non-Governmental Organisations in International Law* (2005) 304.

cases.[101] Hence the admittance of third parties is relatively liberal in an advisory proceeding.

In the Advisory Opinion of the African Court on the *Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights*,[102] a case concerning, *inter alia*, the competence of the African Children's Committee to refer cases to the Court for a binding decision, requests for intervention were sent to AU member countries and organs as well as NGOs like the Institute of International Law.[103] The transmission was done in terms of the aforesaid Rule 69 of the Rules of the Court's Rules and potential intervenors were given 90 days to file observations in line with Rule 70 thereof referenced above.[104] The Court received observations from states such as Kenya, Senegal and Gabon, as well as the African Commission at Banjul.[105] It appears that civil society did not file any statements in this case, leaving states to dominate the process. A view has been expressed that states tend to intervene in cases 'where a point of general public international law is being considered.'[106]

As in the case of the African Commission, in terms of the African Court's Practice Directions,[107] groups that possess specialised information or knowledge may be invited by the African Court to file observations in a case.[108] Indeed, the Court has on occasion reached out to invite *amicus* briefs. For instance, in *Actions pour la protection des droits de l'Homme (APDH) v The Republic of Côte D'Ivoire* (the *APDH* case),[109] it solicited opinions from the AU Commission and the African Institute for International Law to help decide the question as to whether certain regional instruments[110] are human rights instruments within the meaning of article 3 of the Court's Protocol.[111] The practice of soliciting *amicus* briefs is consistent with that of the European and the Inter-

[101] C Chinkin *Third Parties in International Law* (1993) 229.
[102] Application no. 002/2013, 5 December 2014.
[103] Ibid. para 10.
[104] Ibid.
[105] Ibid. para 26.
[106] DJ Harris *et al Law of the European Convention on Human Rights* (2014) 153.
[107] Adopted by the African Court at its fifth Extraordinary Session held in Arusha Tanzania in 2012.
[108] Ibid. Clause 45 thereof.
[109] Application no. 001/2014, Judgment of 18 November 2016.
[110] The African Charter on Democracy, Elections and Governance and see para 3 of the judgment.
[111] *APDH* case (n 109 above) paras 28 & 50.

American Courts which are known to solicit *amicus* briefs from NGOs if they believe that their submissions will be useful in the determination of cases at hand.[112]

Unlike the African Commission, the African Court keeps summaries of cases pending before it on its website. This practice has also been adopted by the European Court, which uses the internet to display case information. The African Court publishes the enrolment of the case, its brief salient facts as well as the relevant provisions that are alleged to have been violated. However, the major challenge for *amici curiae* in the context of the African Court is that these case summaries are often thrifty in detail and therefore woefully incomprehensible.[113] This makes it difficult for potential *amici curiae* to have a full appreciation of the issues involved in a case in order to decide whether or not to intervene. [114]

The problem of unhelpful summaries is compounded by the fact that, generally, before an entity is admitted as *amicus curiae*, it is not allowed access to the Court's case file. This in turn limits the ability of *amici curiae* to make effective use of the Court's *amicus* procedure. It is in that context that Oder writes that '[f]or a vibrant third-party intervener or *amicus curiae* practice to flourish before the African Court, potential interveners have to have information on the nature of cases pending before it.'[115] Other concerns are that the Court's case summaries do not contain information about the stage of the case, deadlines and terms for the filing of *amicus* briefs. In addition, the Court's website is not always up to date.[116]

Mr Deya of PALU expressed the view that sometimes potential *amicus* entities get to learn about a case they would have desired to intervene in when the pleadings are closed and it is no longer opportune for *amici curiae* to participate or when there is limited time left for the filing of briefs, making it difficult for prospective intervenors to file well-researched and sound briefs.[117] In terms of Clause 44 of the Court's Practice

[112] Hodson (n 40 above) 54.
[113] Interview with Mr Donald Deya, Director, Pan African Lawyers Association, 15 May 2017.
[114] Ibid.
[115] J Oder 'The African Court on Human and Peoples' Rights' order in respect of the situation in Libya: A watershed in the regional protection of human rights?' (2011) 11/2 *African Human Rights Law Journal* 508.
[116] Interview with Mr Dieu-Donné Wedi Djamba, Executive Director, Coalition for an Effective African Court on Human and Peoples' Rights, 16 May 2017.
[117] Interview with Deya, n 113 above.

Directions, case information shall be placed at the disposal of *amici curiae*, but only in relation to the matter for which an intervention application has been granted. This means that access to parties' pleadings is possible only upon admission as an *amicus* and not before then.

Prior admission access problems persist and are yet to be overcome. By contrast, the European Court displays the timelines for the filing of *amicus* briefs in a given case (even though these timelines are unclear in the context of the Grand Chamber).[118] However, according to Michael Fordham QC, who frequently appears before the European Court for intervenors:

> A major problem is that those who might have intervened do not find out about the case until too late. It is common for NGOs to face a last-minute scramble to try and get permission when the timing makes them least popular: the timetable and time-estimate are fixed by the parties, and the injection of materials and submissions presents practical difficulties.'[119]

As a supplemental measure, sometimes NGOs seeking to intervene in cases before the African Court use their direct but informal access to officials of the Court registry to make further inquiries about the case and gather information that will enable them to decide to intervene or otherwise.[120] In some cases, NGOs make inquiries from direct parties, especially applicants (where they are known), and also attend Court to observe proceedings and triangulate information from all possible sources.[121] It must be pointed out that informal networks depend on familiarity. This means that NGOs without a history of working with the Court and its officials may not be able to exploit these informal avenues of information gathering.

To address these concerns, the Court should upload pleadings of all cases on its website in the same manner as the ICJ and the Inter-American Court.[122] At the national level, this approach has been adopted by the Constitutional Court of South Africa which publishes full records of cases, that include pleadings and heads of argument

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[118] Crema (n 6 above) 129.
[119] M Fordham 'Public interest intervention: a practitioner's perspective' (2007) 3 *Public Law* 410.
[120] Interview with Deya, n 113 above.
[121] Ibid.
[122] Ibid.

under the heading 'forthcoming hearings.'[123] There is no basis for the African Court to do otherwise as it is not subject to confidentiality restrictions like the African Commission.

However, the proposal that the Court should allow potential *amici curiae* access to the complete pleadings of all submissions in pending cases has not been well-received by some members of the Court. For instance, Former President of the Court, Justice Augustino Ramadhani argues that it is in line with judicial propriety and universally accepted and sound practice that the pleadings of record parties must not be made public before the case is decided.[124] He argues that it must be remembered that pleadings are meant for the Court and not for *amici curiae* and it would therefore be unseemly to allow these entities free access to case records.[125] More critically, he argues that the public may uncritically treat the contents of published pleadings as established facts and not mere allegations, and this may create a wrong impression that the Court has prejudged the case.[126]

Justice Ramadhani argues that nothing is more obligatory for courts of law than to preserve the integrity of their proceedings from possible misrepresentation, nor is there anything of more damaging consequence than to predispose the public psyche against parties in a case, before the case is heard.[127] In his view, this would 'create chaos for the Court' and bring it into disrepute.[128] Justice Bernard Ngoepe shares the sentiments expressed by Justice Ramadhani, and describes such a proposal as 'going a bit too far' and as being out of keep with judicial solemnity.[129] While debate on this aspect rages on, in the interim, the Court should allow supervised *ad hoc* access to the Registry of the Court where potential *amici curiae* can inspect case files in order that they may decide whether or not to intervene.[130]

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[123] See the website of this Court: https://www.concourt.org.za/index.php/caseload/caseflow-summary (accessed 21 June 2018).
[124] Interview with Justice Augustino Ramadhani, former President of the Court, 16 May 2017.
[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Interview with Justice Bernard Ngoepe, former Vice President of the Court, 26 June 2017.
[130] Interview with Deya n 113 above.

In fact, the Deputy Registrar of the Court indicated to the present writer during an interview that while the Court is opposed to uploading the parties' pleadings on the website, it is prepared to share part of the pleadings which are not confidential with potential *amici curiae*.[131] In other words, it is willing to share redacted information. In addition, entities desirous to inspect a file for the purposes of intervention may make their request to the Registry of the Court in writing and may be granted access to documents as the Court's Registry sees fit.[132] Given the controversial nature of the issue relating to the uploading of pleadings on the internet, it remains to say that the matter needs to be studied carefully and seriously to devise a favourable model or criteria through which civil society may obtain sufficient information to enable it to decide on whether or not to intervene in particular cases, without undermining or breaching the decorum of the Court.

4.3.3 The *amicus* regime of the African Children's Rights Committee

Although the Committee's constituent Charter and its Rules of Procedure contain no specific provisions that expressly provide for this body's *amicus* procedure, some provisions of these instruments may also be broadly read as authorising *amicus* interventions before this body. For instance, the African Children's Charter authorises the Committee to employ 'any appropriate method of investigating any matter' within the purview of its jurisdiction.[133] According to Viljoen and Abebe, this provision can be liberally interpreted as empowering the Committee to permit individuals and interest groups to file *amicus* briefs in its proceedings.[134]

Further, in terms of Rule 96 of the Committee's Rules, the Committee has the power 'to solicit or accept interventions by parties, other than the complainant and the defending State that it considers will provide it with information relevant to making a decision on a communication.' Although this Rule does not expressly use the designation of '*amicus curiae*' in its language, it creates a third-party procedure to all intents and purposes and applies to the filing of *amicus* briefs.[135] In addition, Rule 72 thereof authorises the Committee to invite AU organs and institutions, United Nations

[131] Interview with Mr Nouhou Diallo, Deputy Registrar, African Court, 17 May 2017.
[132] Ibid.
[133] Article 45(1) of the African Children's Charter.
[134] Viljoen & Abebe (n 47 above) 38.
[135] Ibid.

bodies, any intergovernmental institutions and NGOs to file reports in its communication proceedings to aid in the implementation of the Children's Charter.

For avoidance of doubt, the African Children's Rights Committee revised its Guidelines for the Consideration of Communications in 2014,[136] and among other things, made express provision for *amicus* participation in its proceedings. In terms of these Guidelines, '[t]he Committee may decide to solicit or accept interventions by parties other than the complainant and the respondent state that it considers will provide it with information relevant to making a decision on a communication.'[137] The Committee may receive submissions 'from natural and legal persons other than the parties to a Communication for the purposes of providing the Committee with relevant information relating to the law, facts, arguments or evidence in a Communication.'[138] It may also, where necessary, authorise the author of an *amicus* brief to address it in an oral hearing.[139]

As in the case of the African Commission, every communication to the Committee is treated in confidence.[140] The Committee's actual deliberations on a communication are held in camera. The Committee does not provide any information about pending cases in its session reports. Only general matters of a procedural nature pertaining to the communication may be heard in an open session.[141] This means that 'no information about the content or progress of the Committee's deliberations [on communications]' may be furnished to the public.[142] This information 'blackout' is remarkable given the fact that the Committee provides a database of national children's rights cases on its website.[143] The Committee's website contains a list of cases revealing the names of

[136] Adopted during the 1st Extra-Ordinary Session of the African Children's Committee - October 2014.
[137] Section XVII (1)(i).
[138] Section XVII (2)(i).
[139] Section XI 4(iv).
[140] See article 44(2) of the African Children's Charter. In amplification thereof, article 32(3) of the Committee's Rules of Procedure states that '[t]he committee shall … hold its deliberations on Communications in closed sessions.'
[141] J Sloth-Nielsen 'Children's rights litigation in the African region: lessons from the communication procedure under the ACRWC' in T Liefaard & JE Doek (eds) *Litigating the rights of a child: the UN Convention on the Rights of the Child in domestic and international jurisprudence* (2015) 257.
[142] Ibid. 257.
[143] M Killader 'Human rights developments in the African Union during 2015' (2016) 16/2 *Journal of African Human Rights Law* 551.

the parties, the date on which the communication was filed, and the statuses of cases as to whether they are pending or have been finalised.[144]

It has been said that the Committee's confidentiality restriction relates less to the fact that the communications concern children than to the principle of respect to the states parties to the African Children's Charter 'and as such it echoes the practice of the African Commissions.'[145] This confidentiality control explains why even though the Committee is presently seized with a number of communications, no information relating to their content or the progress of the Committee's deliberations is known by the public.[146] As in the case of the African Commission, the problem of the excessive confidentiality of information on cases before the Committee denies individuals and interest groups information about suitable cases pending before this body in which they may be inclined to intervene as *amici curiae*.

As pointed out in the case of the African Commission, entities seeking to intervene as *amici curiae* are at the moment served by informal channels of communication, which typically favour only well-connected and well-financed NGOs.[147] However, Ayalew Assefa notes that while the confidentiality controls of this body may seem crippling in theory, this difficulty must not be over-emphasised because in practice, NGOs that have brought cases before the Committee as petitioners give details about these cases on their websites and via media statements, as part of their publicity strategies. This allows third parties who take an interest in these cases to approach the Committee to file statements.[148] Whatever the case, an informal access arrangement cannot be a substitute for a formal one as discussed in the case of the African Commission.

As suggested in the context of the African Commission, it is important that the pleadings in communications lodged with the Committee be redacted and placed at the disposal of the public through the Committee's website to enable individuals and

[144] See www.acerwc.org (accessed 20 October 2017).
[145] Sloth-Nielsen (n 141 above) 257.
[146] Ibid.
[147] Interview with Frans Viljoen, Director, Centre for Human Rights, University of Pretoria, 11 September 2017.
[148] Interview with Ayalew Assefa, Legal Researcher with the African Children's Committee, 19 October 2017.

interest groups to study them for the purpose of deciding whether or not to intervene as *amici curiae*. However, in doing so, there shall be no publication of the identity of the child victim(s) or any detail that will lead to the identification of such a child or children as their identity should be protected. All measures must be taken to ensure that the privacy rights of the concerned child or children are guaranteed and not jeopardised. The concealment of the identity of children participating before the Committee may also serve to protect them or their families from reprisals.

During an interview with the author hereof, the Chairperson of the African Children's Rights Committee, Professor Benyam Dawit Mezmur explained that the Secretariat of the Committee is presently 'busy' finalising summaries of the communications pending before this body with a view to facilitate *amicus* briefs.[149] He states that it is intended that such summaries should go 'beyond stating the names of the parties to the communication, and rather provide a few more details on the factual and legal questions that are raised in the communication.'[150] It is hoped that such summaries will 'elicit the interest of organisations, bodies, or entities who might offer relevant views in connection with the communication.'[151]

The Civil Society Organisation Forum for the African Children's Charter (CSO Forum), could also serve as an excellent platform for civil society to share among themselves information on cases that they may be aware of that are pending before the Committee in which they may be interested to file *amicus* briefs. Designed along the lines of the NGO Forum preceding the business of the African Commission, the Committee sessions are preceded by a CSO Forum, convened by an independent steering Committee comprised of NGO representatives from the five geopolitical regions of the African continent.[152] More than 450 NGOs from across Africa are members of this Forum. In addition to NGO officials, at least two members of the Committee attend this Forum. The CSO Forum has also set up its own website, where affiliated organisations may share case

[149] Interview with Benyam Dawit Mezmur, Chairperson of the African Children's Rights Committee, 12 December 2017.
[150] Ibid.
[151] Ibid.
[152] J Sloth-Nielsen 'Regional frameworks for safeguarding children: the role of the African Committee of Experts on the Rights and Welfare of the Child' (2014) 3/4 *Social Sciences* 956.

s that they are working on for possible intervention by *amici curiae*.[153]

4.4 Identifying and bridging gaps in the regulatory frameworks

The examination of the statutes and rules of procedure of African human rights judicial and quasi-judicial human rights bodies reveals some gaps and inadequacies in their *amicus* procedures which may undermine the effectiveness of those procedures. The African judicial and quasi-judicial bodies should not only formally entrench the *amicus* procedure in their Rules of Procedure but should also specify the applicable terms and conditions for such interventions, both in terms of substantive and procedural requirements.[154] As pointed out above, these bodies may invoke their rule-making powers to introduce the necessary changes to their *amicus curiae* regimes.

4.4.1 Novelty of the contribution

All relevant instruments of the African judicial and quasi-judicial bodies are silent on the novelty requirement. *Amicus* briefs which are a mere echo of the parties' arguments – the so called 'me too' submissions – must be discouraged as they overburden courts unnecessarily and render them inefficient. Indeed, in *Kenneth Good v Botswana*,[155] the African Commission indicated that it could not process the filed *amicus* brief since it contained submissions which were already reflected in the arguments filed by the petitioner.[156] The African Court's Practice Direction requires the *amicus* intervenor to 'specify the contribution they would like to make with regard to the matter.'[157]

Viljoen argues that it seems that the African Court does not require the brief to make a novel contribution but rather merely stipulate its proffered assistance.[158] According to Wiik, all that the Practice Direction of the African Court requires in this regard is that the brief must be relevant to the case submitted to the Court.[159] This means that novelty before the African Court is not insisted upon. Indeed, it has been suggested by some writers that perspectives by third parties in support of a particular position in

[153] The website of the Committees' CSO Forum: <http://www.csoforum> (accessed 30 July 2017).
[154] Viljoen & Abebe (n 47 above) 41.
[155] Communication 313/05.
[156] Ibid. para 133.
[157] Practice Directions (n 107 above) Clause 42.
[158] Viljoen (n 90 above) 95.
[159] Wiik (n 24 above) 286.

a cause may be welcome. This is because such viewpoints by third parties 'may make certain type of information more legitimate than if such information had to be retrieved *ex officio*'.[160]

Similarly, a recent study in the US that was conducted with the aid of computer-assisted content analysis techniques discovered that the US Supreme Court adopts 'more language from *amicus* briefs that repeats information contained in' parties' submissions, and that 'rather than ignore repetitious arguments, the justices are likely to view repeated arguments as valid and integrate those arguments into their opinions.'[161] Despite this practice, it is proposed that the African human rights system should follow the example of the African Commission and reject briefs that seek to duplicate the submissions by the primary parties. This novelty requirement must be reflected in the applicable rules for avoidance of doubt.

It has been pertinently argued that 'the African Court should first receive and peruse arguments made by parties, and then decide if third-party briefs make valuable contributions.'[162] The novelty requirement has been insisted on by some African domestic courts. For instance, the Court of Appeal of Botswana has stated that leave to intervene will only be granted if the applicant has some 'special expertise useful to the Court, or has something new to add'.[163] As Chinkin and Mackenzie suggest, in order to maintain an orderly adjudication process any court 'must determine whether the *amicus* brief is capable of making a useful contribution to the trial, that is in assisting the tribunal and in striking a balance between receiving excessive information and being as fully informed as possible on all points.'[164]

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[160] HP Olsen 'International courts and the doctrinal channels of legal diplomacy' (2015) 6/3-4 *Transitional Legal Theory* 669. See also N Bürli *Third party interventions before the European Court of Human Rights* (2017) 61.

[161] P Collins *et al* 'The Influence of *amicus curiae* briefs on U.S. Supreme Court opinion content' (2015) 49/4 *Law & Society Review* 936.

[162] Viljoen (n 44 above) 52.

[163] *Kenneth Good v Atttorney General* (2005) 2 BLR 336. See also *Kgafela II v Attorney General & Othrs; In re Gabaokelwe v Director of Public Prosecutions* (2012) 1 BLR 724; *Law Society of Botswana v Oagile key Dingake & Othrs*, Case no. CACGB-108/16, paras 9 – 13.

[164] C Chinkin & R Mackenzie 'Intergovernmental Organizations as "friends of the court"' in LB de Chazournes *et al* (eds) *International organizations and international dispute settlement: trends and prospects* (2002) 135.

4.4.2 Who is allowed to intervene?

In the European and Inter-American systems, there seems to be no limit as to who may file *amicus* briefs before the adjudicatory bodies. Likewise, the interpretive organs of the African human rights system must broaden their scope of processual capacity by accepting briefs not only from NGOs and individuals, but also from other entities such as National Human Rights Institutions (NHRIs) and others.[165] Indeed, the Network of African National Human Rights Institutions (NANHRIs) has advised NHRIs to 'consider submitting *amicus curiae* briefs before the African Commission and African Court where appropriate.'[166] There being no reason to exclude the Committee, this body should be 'read into' the entities that NHRIs should also appear before as *amici curiae*.

In fact, according to its Rules of Procedure, the Committee is authorised to receive 'reports, information or advice' from NHRIs in discharging its monitoring functions, which include consideration of communications.[167] The NANHRI therefore considers the capacity building of NHRIs as one of its key aims to ensure the formalisation of the role of these entities in the litigation of the African adjudicatory bodies, including as *amicus* intervenors.[168] NHRIs have also begun intervening before the European and Inter-American Courts of Human Rights. Just as the contribution of NGOs at international and regional levels is seen as important because they provide a level of expertise in human rights law, so NHRIs could make the same claim.[169]

Although the independence of many African NHRIs is questionable, their national prominence as well as their focus on the material realities of African societies places them in good stead to identify suitable cases in which to intervene and offer additional information on the human rights situation of individual countries. As of January 2018,

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[165] Viljoen & Abebe (n 47 above) 41.
[166] See Guideline no. 12 of the Guidelines on the Role of NHRIs in monitoring and implementation of Recommendations of the African Commission on Human and Peoples' Rights and Judgments of the African Court on Human and Peoples Rights http://www.nanhri.org/wp-content/uploads/2016/10/draft-13-English-Version.pdf (2016) (accessed 15 November 2016).
[167] Rule 84(3)(g), thereof.
[168] Interview with Gilford Kimathi, Legal Officer, Network of African National Human Rights Institutions, 26 December 2017.
[169] R Murray *The role of National Human Rights Institutions at the International and regional levels* (2007) 18. See also K Roberts 'National Human Rights Institutions as diplomacy actors' in M O'Flaherty *et al* (eds) *Human rights diplomacy: contemporary perspectives* (2016) 244.

twenty-four of them were granted affiliate status with the African Commission.[170] There has been a rapid proliferation of NHRIs in Africa since the mid-1990s as various countries started the transition from authoritarianism to democracy.[171]

NHRIs have also begun involving themselves in human rights litigation at national level. For instance, in the Malawian case of *In Re: Adoption of Children Act (Cap.26:01)*; *In re: David Banda*,[172] dealing with inter-country adoption, the Malawi Human Rights Commission, applied and was granted leave to join the proceedings as an *amicus curiae* by the Malawian High Court. Similarly, in *University of Stellenbosch Legal Aid Clinic & Othrs v Minister of Justice & Othrs*,[173] a case dealing with the attachment of emoluments in maintenance matters, the South African Human Rights Commission intervened as an *amicus curiae*.

4.4.3 What process to follow to intervene?

There is presently no clarity as to how those who wish to file *amicus* statements before the African Commission may do so. By contrast, the processes for filing briefs before the African Court and the African Children's Rights Committee are prescribed in the Court's Practice Directions and the Committee's Revised Guidelines on the Consideration of Communications, respectively. In respect to the last two bodies, the *amicus* applicant must lodge an application with the Registry of the Court or the Secretariat of the Committee for leave to intervene in the proceedings.[174]

In addition, for the Court, the *amicus* applicant must establish its identity, credentials and competences in the intervention application in order to take the Court into its confidence that it will be in a position to assist it.[175] In the case of the Committee, the application should state the following: (a) the names of the *amicus* applicant or the

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[170] For a listing of these NHRIs see http://www.achpr.org/network/nhri/ (accessed 10 January 2018).
[171] RE Kapindu 'The role of National Human Rights Institutions at international and regional levels: the experience of Africa by Rachel Murray: book review' (2008) 125/1 *South African Law Journal* 197.
[172]Adoption Cause 2 of 2006 (2008) MWCH 3 28 May 2008. Malawi Human Rights Consultative Committee (a network of CSOs that work together to promote and protect human rights in Malawi) also filed an *amicus* brief in the proceedings although it did not participate in the oral hearing. According to the Court, it granted leave to *amici curiae* to intervene being 'conscious of reaching out to the wider opinion especially from human rights institutions because obviously they have the human rights and welfare of children of this country at heart.'
[173] SA (2016) 596.
[174] The African Court's Practice Directions (n 107 above), Clause 42; Revised Guidelines for the Consideration of Communication, Section XVII (1)(ii).
[175] Interview with Justice Ramadhani, n 124 above.

applicant's representatives; (b) the interest that the applicant has in the case; (c) the object of the intervention; and (d) a summary of the supporting documents and annexures to be filed.[176]

Once the brief has been filed, the African Court's Practice Directions state that '[t]he Court will examine the request and determine within a reasonable time from the date of receipt of the request, whether or not to accept the request to act as *amicus curiae*.'[177] In the event that the Court accedes to the request, the person, organisation or entity requesting leave to intervene shall be notified by the Registrar of the outcome of the application and invited to file submissions, together with any documents or annexures, at any point during the course of the proceedings.[178]

Where leave to file a brief is granted, the Court will, in exercise of its discretion, fix a timeline within which the *amicus* brief must be filed, which is usually thirty days.[179] The Court may on application extend this timeline on good cause shown.[180] Naturally, there should be temporal limits for the orderly participation of *amici curiae* and to ensure that non-parties do not unduly delay proceedings. Next, the Court places the application, together with any subsequent pleadings concerning the case for which the request for *amicus* intervention has been made, at the disposal of the intervening person or organisation.[181]

The *amicus* brief together with its annexures are immediately transmitted to all concerned parties for their consideration and action.[182] In the case of the African Children's Rights Committee, upon the filing of an *amicus* brief, this body shall determine the intervention application and communicate its decision to the *amicus* applicant within 30 days of the receipt of the application.[183] Where the application to intervene has been granted, the applicant shall prepare and file its submissions before

[176] Section XVII (1)(ii).
[177] Practice Directions (n 107 above) Clause 43.
[178] Ibid. Clause 44 thereof.
[179] Interview with Dr Robert Eno, Registrar of the African Court, 15 May 2017.
[180] Ibid.
[181] Practice Direction (n 107 above) Clause 44.
[182] Ibid. Clause 46.
[183] Section XVII (1)(iii).

the Committee within 60 days from the date the decision on the intervention application was communicated.[184]

Unlike in the case of the African Court, the Revised Guidelines of the Committee are silent on the right of reply to the brief by the respondent state. Before the African Commission, the respondent states' right to reply to an *amicus* statement has been established through judicial practice. The African Commission has always transmitted filed *amicus* briefs to respondent states for comment. However, it is submitted that both the Commission and the Committee should amend their relevant instruments to reflect this important procedural step, as it guarantees due process in litigation. It ensures that a tribunal does not make an adverse finding against a party based on a legal or factual claim made by an *amicus curiae* which such a party was not afforded an opportunity to comment upon.

In the context of the Inter-American Court, *amicus curiae* briefs are transmitted to the parties 'for their information.'[185] In addition to codifying this requirement, the Rules of Procedure must also prescribe the timelines by which states may submit their responses on the *amicus* briefs to the court or tribunal. It is also important to indicate that such intervention is a matter of judicial grace and not of right. The African Court's Practice Directions are clear: admission of an *amicus* entity in the proceedings of this body is not automatic. The decision on whether or not to grant an application for intervention by an *amicus curiae* is at the sole discretion of the Court.[186] This is in line with the position that the 'court should be left to choose or approve its friends.'[187]

It is needless to state that such discretion should be judicially and judiciously exercised. This is a restatement of the practice at both domestic and international courts. Thus, although the Rules of Procedure of the African Commission and the Guidelines of the Committee are silent on this aspect, it can be safely assumed that the involvement of *amici curiae* before these bodies is naturally at their sole discretion.

[184] Section XVII (1)(iv).
[185] IACtHR Rules, Article 44.3.
[186] Practice Directions (n 107 above) Clause 47.
[187] *Oboth Marksons Jacobs v National Resistance Movement*, Miscellaneous Application no. 108/2010.

This is despite the fact that in practice the Commission virtually grants 'blanket authorisation' for the filing of briefs.[188]

Principal parties to the case have no veto powers in the admission of briefs before all the three bodies. It is not farfetched to imagine that if the parties were vested with such powers, they may potentially use it arbitrarily to object to the admission of valuable perspectives to the dispute from third parties. The interests of justice, and not the interests of the parties, should be an overriding principle in deciding admission questions.[189] In particular, denying the parties veto powers in the admission process, 'prevents the interference of the parties even in high stakes disputes'.[190]

The practice of denying veto power to record parties can be contrasted with the WTO tribunals' practice at the extreme end of the spectrum where parties play a decisive role in the admission of *amici curiae*.[191] It must be noted that the absence of a veto power to be exercised by the parties to prevent the court from accepting *amicus* materials does not imply that the parties do not have the right to be protected from certain harmful risks that these submissions may cause.[192] One way of protecting the interests of primary parties is to accord them the right of reply to the *amicus* submissions.

Finally, it is submitted that the African Commission should draw guidance from the relevant instruments of the African Court, the African Children's Rights Committee and as other international courts and tribunals to formulate its own rules governing the procedure of filing *amicus* briefs in its proceedings.

4.4.4 When can *amicus curiae* intervene?

Like the African Court, the African Commission permits *amicus* intervenors to file briefs at any stage of its proceedings. In *Asociacion Pro Derechos Humanos de Espafia*

[188] Interview with Tilahun, note 76 above.
[189] Crema (n 6 above) 130.
[190] Ibid.
[191] Ibid. 129 – 130.
[192] KF Gómez 'Rethinking the role of *amicus* in international investment arbitration: how to draw the line favorably for public interest litigation' (2012) 35/2 *Fordham International Law Journal* 560.

(APDHE) v Equatorial Guinea (the *APDHE* case),[193] the African Commission received a consensus brief from a group of human rights academics and activists: Abdul Baasit Abdul Asiz, Raymond Atuguba, Makau Mutua, Kwasi Prempeh and Otto Saki. In the words of the authors, the purpose of the brief was 'to assist the [Commission] in addressing the admissibility of [the] communication,' providing the Commission with a legal analysis concerning the application of the exhaustion rule.[194]

A liberal approach in allowing *amicus* participation to extend to preliminary stages of the case takes into account the possible desire of a prospective intervenor to address an issue falling within the scope of admissibility. In addition, the admissibility hearing normally touches on both the admissibility and merits of the case.[195] Thus, not allowing *amicus* interventions from the outset until after the admissibility has been decided, when a tribunal will have already deliberated on the merits and made preliminary observations, substantially undercuts the effectiveness of the *amicus* intervenor in influencing the case outcome.[196] However, the filing of briefs at seizure stage is premature and the Commission will not accept it.[197] This appears to be the position at both the African Court and the African Children's Committee.

The practices of other international courts and tribunals vary on the precise scope of *amicus* interventions. Rule 44 of the European Court allows *amicus* intervention at an early stage in the proceedings, i.e from the time the proceedings are lodged with the Court, and not only after the question of admissibility has been dealt with as before.[198] This is in line with the approach adopted by the Inter-American Court. In the *Kimel v Argentina*[199] and *Castañeda Gutmán v Mexico*[200] cases, the Inter-American Court clarified that *amici* briefs may be filed at any stage before final judgment given. The latter Court later amended its Rules in 2009 to reflect this practice.[201] The EACJ has

[193] Communication 347/07 (premilitary/ admissibility).
[194] A copy of the brief is on file with author.
[195] N Blackaby & C Richard '*Amicus curiae*: a panacea for legitimacy in investment arbitration' in M Waibel (ed.) *The backlash against investment arbitration: perceptions and reality* (2010) 270.
[196] Ibid.
[197] Interview with Abiola Idowu-Ojo, Senior Legal Officer, African Commission, 09 November 2017.
[198] N Vajic 'Some concluding remarks on NGOs and the European Court of Human Rights' in T Treves *et al Civil Society, International Courts and compliance bodies* (2005) 98.
[199] IACtHR, (Ser C) no. 177 [2008], Judgment of 2 May 2008.
[200] IACtHR, (Ser C) no. 184 [2008], Judgment of 26 November 2008.
[201] See Rule 44(3) thereof.

granted leave to an *amicus* to argue no cause of action,[202] while the NAFTA tribunal has ruled that *amicus* participation at the preliminary stages of the case was inappropriate.[203] Similarly, the Permanent Court of Arbitration (PTA) has also declined *amicus* submissions concerning its jurisdiction.[204]

Finally, it would also be important to expressly provide for the possibility of *amicus* interventions not only during the trial but also after the adoption of a decision in a case which will still be pending before the Commission, the Court or the Committee for the purposes of monitoring its implementation. In this regard, *amici curiae* could assist these bodies to gather evidence relating to the compliance of states with the decisions of these bodies. The possibility for individuals, NGOs and groups to monitor compliance in cases that they were involved in as friends of the court is certainly intuitive.

The third parties that have already acquainted themselves with certain cases are likely to follow-up on compliance of the decision.[205] Following up on a case and ensuring that the judgment is implemented is part of the all-inclusive strategy of engineering social change.[206] Despite the lack of clarity in the Rules of the Commission, the Centre for the Implementation of Human Rights of the University of Bristol was granted leave to intervene in *African Commission v Kenya* (the *Ogiek* case),[207] post decision, while the Commission is considering its ruling on reparations.[208]

4.4.5 Neutrality of the brief

The question of the neutrality of *amicus* briefs is not dealt with in the relevant instruments of the interpretive organs of the African human rights system. However, from the interviews conducted by the present author with officials of the African judicial and quasi-judicial bodies, neutrality is supported in principle. For instance, Commissioner Mute emphasised in an interview with the present writer that it is part

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[202] *Anyang' Nyong'o v Attorney General of Kenya*, Application no 5 of 2007, 13, Judgment of 31 July 2010.
[203] *United Parcel Service of America Inc and Government of Canada, Decision of the Tribunal on Petitions for Intervention and Participation as amici curiae*, para 71, 17 October 2001.
[204] *Chevron Corporation USA and the Republic of Ecuador*, Case no. 2009-23 Procedural Order no. 8, para 20, 18 April 2011.
[205] S Dothan 'A virtual wall of shame: the new way of imposing reputational sanctions on defiant states' (2007) 27/2 *Duke Journal of Comparative & International Law* 169.
[206] Ibid. 169 – 170.
[207] Application no. 006/2012, Judgment 26 May 2017.
[208] The filed *amicus* brief is on file with author.

of the admission requirements of the African Commission that *amicus* briefs must be neutral.[209] In his view, neutrality bolsters the credibility of the brief.[210] However, from the survey of relevant cases, it appears that in practice, the Commission does not insist on neutrality.

It is therefore unsurprising that virtually all the briefs received by this body were in support of one of the parties, usually the petitioner. According to judge Achour of the African Court, as 'a *conditio sine qua non* for intervention … an *amicus* applicant must demonstrate that it is objective, neutral and out of the contestation before it could be admitted by the Court to ensure that the intervenor is a friend of the Court and not a friend of the party.'[211] Justice Ramadhani adds that neutrality is a cardinal principle for *amicus* participation since an *amicus curiae* needs to be open and candid with the court and scrupulously assess the merits and de-merits of both sides of the claim or argument.[212] Neutrality is also insisted upon in African domestic courts.[213]

However, like the African Commission, it appears that in practice the African Court does not reject briefs for lack of neutrality. For instance, in *Ingabire Victoire Umuhoza v Rwanda* (the *Umohoza* case),[214] it allowed the National Commission for the Fight against Genocide (the NCFAG), an agency of the respondent state to file an *amicus* brief. In dismissing an application by the applicant urging the Court to refuse the filing of the brief on the ground that the filer of the brief was an agent of the state and therefore not neutral, the Court reiterated that it is clothed with discretion both to admit *amici curiae*, and to 'take what it considers relevant and non-partisan from the *amicus* [brief]'.[215] The African Court's approach is therefore fairly generous in admitting *amicus*

[209] Interviews with Commissioner Mute, n 61 above.
[210] Ibid.
[211] Interview with Justice Rafaa Ben Achour, member of the African Court, 16 May 2017.
[212] Interview with Justice Ramadhani, n 124 above.
[213] *Kenneth Good v Attorney General* BLR (2005), 'I have always thought that an *amicus curiae* was what the words convey *viz* a "friend of the court" whose function it is to come to the assistance of the court by bringing to its attention factual matters or legal decisions or statutes which it may have overlooked. It is not his function to adopt an adversarial role and seek to undertake the management of the cause or argue the case of one or other of the parties in the proceedings in which the *amicus* has been given leave to intervene.'
[214] Application no. 003/2014, Notification of Order, 03 June 2016.
[215] Ibid para 38.

briefs, while stressing that it retains the residual authority to carefully analyse and decide on the weight to attach to a brief.[216]

Similarly, the Ugandan Supreme Court has held that although the question of impartiality was a critical factor to take into consideration in the admittance of an *amicus* intervenor, 'it is not the only factor.'[217] In the opinion of this Court, 'the court can ... take what it considers relevant and non-partisan from the *amicus* and the ultimate control over what the *amicus* can do is the court itself.'[218] However, the mere fact that a brief favours a particular position adopted by one party does not necessarily make it partisan. Whatever the intent of the intervenor, it is very likely that its brief will lend some measure of support to one of the parties against the other.

In the United States, it is no longer a requirement that an *amicus* brief be neutral. In the opinion of Judge Alito, the requirement no longer represented the position of the law in the US as it 'became outdated long ago.'[219] According to this judge, 'an *amicus* who makes a strong but responsible presentation in support of a party can truly serve as the court's friend.'[220] Banner writes that the term '*amicus curiae*' itself appears to be a misnomer given the fact that very few intervenors appear to be willing primarily to assist the court.[221]

Whatever the case may be, it is important for an *amicus curiae* to aspire to neutrality whenever possible in order to clothe its submissions with greater intellectual legitimacy and credibility. It must project a moderate tone and carefully consider claims and interests on either side of the controversy, giving the impression that it is a genuine

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[216] Ibid. 88; E Haslam 'Subjects and objects: international criminal law and the institutionalization of civil society' (2011) 5/2 *International Journal of Transitional Justice* 226.
[217] *Amama Mbabazi v Yoweri Kaguta Museveni, the Electoral Commission, & the Attorney General; Professor Oloka-Onyango & 8 Ors* (*Amici Curiae*); Presidential Election Petition no. 01 of 2016.
[218] Ibid. 16.
[219] *Neonatology Associates v Commissioner of Internal Revenue* 471 F.3d 1021, 1028 (9th Cir. 2006).
[220] Ibid. See also HA Anderson 'Frenemies of the Court: the many faces of *amicus curiae*' (2016) 49/2 *University of Richmond Law Review* 407; JD Kearny & TW Merrill 'The influence of *amicus curiae* briefs on the Supreme Court' (2000) 148/3 *University of Pennsylvania Law Review* 841–2.
[221] S Banner 'The myth of the neutral *amicus*: American courts and their friends, 1790 – 1890' (2003) 20/1 *Constitutional Commentary* 111; See also PM Collins Jr 'Friends of the Court: examining the influence of *amicus curiae* participation in U.S. Supreme Court Litigation' (2004) 38/4 *Law & Society Review* 808; SP Gidiere 'The facts and fictions of amicus curiae practice in the Eleventh Circuit Court of Appeals' (2008) 5/2 *Seton Hall Circuit Review* 2.

friend of the court seeking to assist it in the development of the law and not merely advancing an agenda of one party against the other.

4.4.6 Form and length of the brief

It is important to note that the relevant instruments of the African Commission, the African Court and the African Children's Committee are silent on the length of the *amicus* briefs. Although the Rules of Procedure of the European Court similarly do not prescribe the length of *amicus* briefs, the European Court is entitled to limit the length of the submissions in granting leave for intervention. It usually limits the brief to ten pages.[222] In the case of the NAFTA Commission, the intervention application by a non-disputing party must not be longer than five typed pages and if the application is granted the non-party must file a concise brief, in no case numbering more than 20 typed pages, including appendices, if any.[223]

Setting limitations on the length of *amicus* briefs comports with the sound administration of justice and judicial economy. It ensures that third party submissions are manageable and that the efficiency of the tribunal is not compromised. Excessively long briefs may be ignored by the courts because judges simply have no time to read them. [224] It must be remembered at all times that briefs are easy to admit, and easy to ignore. However, Hodson points out that while the rationale for this limitation is evident, it sometimes operates as a major impediment on those individuals and interest groups seeking to contribute to the development of the tribunals' jurisprudence by filing well-researched submissions, which may be unavoidably long.[225]

To this end, it is suggested that the African judicial and quasi-judicial bodies should retain the discretion to prescribe the page limit for *amicus* briefs, regard being had to the complexity or otherwise of the case. After all, as stated above, it is a task for the tribunals to strike a balance between being proffered excessive information and being informed as much as possible on all pertinent points.

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[222] Hodson (n 40 above) 54.
[223] J Delaney & DB Magraw 'Procedural transparency' in P Muchlinski *et al* (eds) *The oxford handbook of international investment law* (2008) 747.
[224] Wiik (n 24 above) 335.
[225] Hodson (n 40 above) 54.

4.4.7 Language of the brief

The governing instruments of the African Commission and the African Court also do not prescribe that filed briefs must be in any particular language. In *Ingabire Victoire Umuhoza v Rwanda* (the *Umuhoza* case), [226] the *amicus* intervenor filed a brief written in French while the language of the case was English. The translation of the brief into English was done by the Court's registry. This task added a needless extra burden to a registry that was already being crushed under an enormous workload, and accepting such a responsibility in future might only serve to delay proceedings unnecessarily.

To avoid delay, it is proposed that *amicus* briefs should generally be prepared in the language employed by the parties to the dispute.[227] The Committee's Guidelines prescribe that the *amicus* briefs are to be prepared in the working language of the Committee as directed by the Committee itself.[228] Before the European Court, third party statements must be in one of the working languages of the Court: English or French.[229] For their part, the Rules of the Inter-American Court require that an *amicus* brief, together with its annexes, should be submitted 'in the working language of the case.'[230] For bodies established under the NAFTA, the *amicus* brief must be in the language of the arbitration.[231]

While it is not only desirable but imperative that *amicus* briefs must be prepared in the prescribed language, a brief that is not compliant with the language prescription of the Rules must not be immediately rejected, provided it has been filed timeously, but must be returned to the author with the direction that it be translated into the appropriate language within a particular timeframe. It is only when the author of a brief fails to comply with the timeline for translation without good cause that the brief may be archived and not be considered. It is well known that while rules are important for an

[226] Application no. 003/2014, Notification of Order 03 June 2016.
[227] Ibid.
[228] Section XVII (2)(iv).
[229] Rule 24(4)(a) (1) thereof.
[230] Rule 44(1).
[231] Simões (n 53 above) 217.

orderly litigation, their stringent enforcement may occasion failure of justices in some cases.

4.4.8 Consensus briefs

To avoid potential overlaps of submissions between concurrent *amicus curiae*, it is important that the procedural rules of the African regional judicial and quasi-judicial bodies should contain a requirement that potential *amici curiae* should coordinate their efforts and file joint or consensus submissions that comply to the best way possible with the novelty requirements. A joint submission with a specified length is a good tool to keep non-party interventions manageable.[232] The European Court has developed a healthy practice along these lines.[233] It prefers to have as few interventions as possible and as such it encourages NGOs to file joint *amicus* briefs.[234]

The filing of joint briefs carries the advantage of pooling together research resources, and sharing costs. It also avoids the filing of repetitious or overlapping arguments, which may waste the tribunal's and the parties' time. In addition, processing such unhelpful arguments may escalate costs unnecessarily and also render the decision-making process of the tribunal inefficient.[235] Repetitious arguments may also disorientate the tribunal and scatter its attention. It has therefore been suggested that groups should consider coordinating their efforts and filing briefs on a unified front.[236] However, the downside of this approach is that it leaves little room for the diversity of viewpoints that is relevant in judicial analysis.[237]

Moreover, requiring several NGOs or non-parties advancing various perspectives to collaborate and formulate a single brief may involve them in a cumbersome process. For instance, such collaboration may be made difficult by language barriers. But none

[232] Gómez (n 192 above) 559.
[233] Bürli (n 160 above) 11.
[234] R Wintemute 'Robert Wintemute on third party interventions in Strasbourg since 2000' in P Johnson *Going to Strasbourg: an oral history of sexual orientation disorientation* (2016) 169.
[235] D Magraw Jr. & N Amerasinghe 'Transparency and public participation in investor-state arbitration' (2008) 15/2 *ILSA Journal of International & Comparative Law* 353.
[236] JF Spriggs & PJ Wahlbeck '*Amicus curiae* and the role of information at the Supreme Court' (1997) 50/2 *Political Research Quarterly* 380.
[237] Magraw Jr & Amerasinghe (n 235 above) 359.

of these disadvantages detract significantly from the observation that the collaboration of NGOs to conduct legal research is likely to be fruitful.[238]

4.4.9 Mode of service

Finally, in terms of the *modus operandi* for filing, the governing instruments of the African judicial and quasi-judicial bodies should follow the example of the Inter-American Court and create the possibility for the submission of briefs electronically.[239] Electronic service is faster and has the effect of minimising service costs such as courier or postage costs. However, the problem of this service mode is that it can be hacked and the confidentiality of the documents breached. Chief Justice John Roberts Jr wrote that courts of law 'often choose to be late to the harvest of American ingenuity.' [240] He points out that understandably, courts should tread cautiously in relying on digital information technology systems until they have carefully considered how to keep the information contained therein safe and secure from both local and international hackers 'whose motives may range from fishing for secrets to discrediting the government or impairing court operations.'[241]

4.5 Interim conclusion

The present chapter has set out the theoretical and conceptual basis for the formulation and development of *amicus curiae* rules and procedures by international courts and tribunals. It proceeded to consider the adequacy or otherwise of the *amicus curiae* regulatory regimes of the African Commission, the Court and the Committee for effective management of *amicus* briefs filed before these bodies. The chapter notes that the regulatory frameworks of these bodies are underspecified, incomprehensive and therefore inadequate for effective *amicus* participation. As Nollkaemper notes, 'the procedural law of international courts should allow for adjudication of claims involving public goods and, where it does not do so, procedural law should be adjusted.'[242]

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[238] Interview with Gaye Sowe, Executive Director, Institute of Human Rights and Development in Africa, 21 July 2017.
[239] Compare with Rule 44(2) of the Rules of Procedure of the Inter-American Court.
[240] Year-End Report on the Federal Judiciary, 2004. Available at: https://www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf (accessed 09 July 2018).
[241] Ibid.
[242] A Nollkaemper 'International adjudication of global public goods: the intersection of substance and procedure' (2012) 23/3 *European Journal of International Law* 770.

Similarly, Mackenzie argues that '[i]n order to ensure that *amicus curiae* briefs become an efficient means of achieving justice it is necessary to establish appropriate procedures for their submission.'[243] More specifically and concretely, it is proposed that the African judicial and quasi-judicial bodies should consider upgrading their existing rules, particularly by specifying the applicable terms and conditions for *amicus* participation. Such rules should make provision for certain practical considerations such as who may intervene; when such intervention may be made, and the issues that the brief may address.

The rules should also deal with the question of access to case information by *amici curiae*, to make their interventions effective. About two decades ago, the Commission stated in the Mauritius Plan of Action that '[t]he lack of informative documentation on the work of the African Commission is a problem which needs to be solved urgently'.[244] As is clear from this chapter, much needs to be done to facilitate access to case information by interest groups. Finally, in revising the relevant rules, these bodies should solicit the input of NGOs and other organised interests. Inclusivity in the process will go a long way towards enhancing their accountability and legitimacy.

[243] B Stern 'The emergence of non-state actors in international commercial disputes through WTO Appellate Body case-law' in G Sacerdoti *et al* (eds) *The WTO at ten: the contribution of the dispute settlement system* (2006) 385.
[244] The Mauritius Plan of Action 1996-2001, para 7. Reprinted in R Murray & M Evans *Documents of the African Commission on Human and Peoples' Rights* (2001).

CHAPTER 5

THE INFORMATIONAL ROLE OF *AMICI CURIAE*

5.1 Introduction

This chapter theorises and brings into relief both the actual and the potential role of *amici curiae* in judicial decision-making in the African human rights system. Do *amicus curiae* briefs have a role to play in judicial analysis in the African human rights system in this age of extensive discovery, computer-aided legal research and vast amounts of readily available materials? Although there has been extensive commentary about the participation of *amici curiae* before international human rights courts and tribunals, few writers have actually considered the extent to which *amicus* briefs have influenced the reasoning of the courts as well as case outcomes.[1]

Despite this, conventional wisdom and traditional understanding begin with the assumption that *amici curiae* assist courts with information and legal arguments to reach correct decisions as well as to develop new human rights norms and standards. To test these dominant theories and explore the informational role of *amici curiae* in the African system, this Chapter draws on the opinions of the officials of the relevant mechanisms under review and checks for traces of the submissions of *amicus* briefers in final opinions. A judicial or quasi-judicial body mandated with the adjudication of human rights is almost invariably faced with challenges of interpretation given the legal and political indeterminacy of rights norms.[2] These challenges are more evident in hard cases which 'provoke sharp conflict between interpretive choices … and produce heated moral debate in the public sphere.'[3]

In the context of human rights litigation, these interpretational challenges arise, in the main, from the fact that the language of human rights instruments is notoriously vague and leaves specificities to *ex post* adjudication.[4] Killander notes that whether contained in national bills of rights or international human rights instruments, human

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[1] A Wiik *Amicus curiae participation before international courts and tribunals* (2018) 431.
[2] K Klare 'Legal culture and transformative constitutionalism' (1998) 14/1 *South African Journal on Human* Rights 157.
[3] B Harcourt 'Mature adjudication interpretive choice in recent death penalty cases' (1996) 9 *Harvard Human Rights Journal* 255. Dworkin states that 'hard cases' arise 'when no settled rule dictates a decision either way'. See R Dworkin 'Hard Cases' (1975) 88/6 *Harvard Law Review* 1060.
[4] D McGreal 'Drafter decision-making in international human rights treaties' in D Keane & Y McDermott (eds) *The challenges of human rights: past, present and future* (2012) 265.

rights norms are always vague.[5] Human rights Courts and tribunals are therefore generally expected to concretise these norms and harmonise competing interests through treaty interpretation, at times encroaching on the domain reserved for the legislature.[6] It is in such difficult grey areas that interpretational battles for the African Charter and kindred statutes can be contested, norms framed, and the African human rights discourse taken into a new direction altogether.

International instruments are the international equivalent of inchoate contracts. In the process of their interpretation, judges often cannot avoid clarifying ambiguities, mediating conflictual provisions and filling gaps that exist in their texts.[7] In this connection, Kelsen has contended that the very act of law interpretation by the judge is also an act of law-making because, a legal norm can never be determinative of its interpretation.[8] The normative content of a right is, by and large, a jurisprudential creation. Petersmann writes that, by 'filling gaps … judicial decisions inevitably develop and complement legislative rules and intergovernmental treaties in order to settle disputes in conformity with principles of justice.'[9]

Boyle and Chinkin argue that this imprecise language has enabled *amici curiae* to advance innovative arguments that have culminated in extensive re-conceptualisation of substantive provisions of human rights instruments.[10] These two authors use the example of the case of *Velasquez Rodriguez v Honduras*,[11] to advance this claim. This case is widely regarded as a landmark decision in relation to state responsibility for omission, the recognition of disappearances as a human rights violation, and the affirmation of the state's positive duty to exercise due diligence to protect the right to

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[5] M Killander 'Interpreting regional human rights treaties' (2010) 7/13 *SUR International Journal on Human Rights* 145. See also R Bernhardt 'Human Rights and judicial review: the European Court of Human Rights' in DM Beatty (ed.) *Human Rights and judicial review: a comparative perspective* (1994) 302.

[6] M Shahabuddeen *Precedent in the world Court* (2007) 91.

[7] LR Helfer & JK Alter 'Legitimacy and Lawmaking: a tale of three international courts' (2013) 14/2 *Theoretical Inquiries in Law* 484.

[8] H Kelsen 'International peace – by court or government?' (1941) 46/4 *American Journal of Sociology* 571.

[9] E-U Petersmann 'Human rights, international economic law and 'constitutional justice' (2008) 19/4 *European Journal of International Law* 774.

[10] A Boyle & C Chinkin *The making of international law* (2007) 84 See also D Galligan & D Sandler 'Implementing human rights' in S Halliday & P Schmidt (eds) *Human Rights brought home: socio-legal perspectives on human rights in the national context* (2004) 50.

[11] IACtHR, (Ser C) no. 1 [1988], Judgment of 29 July 1988.

life.[12] In that case, a group of NGOs[13] made submissions to the Inter-American Court, assisting it to formulate the doctrine of state responsibility and ultimately to find violations.

According to Zidar, *amici curiae* have shaped the reasoning and decisions of international courts and tribunals in ways that are not commonly realised, which is a unique contribution of NGOs and other organised interests in the interpretation, creation and development of the rules and principles of international law.[14] Ennis holds a similar view that there is a widely held misconception about *amicus* briefs that:

> They are not very important; that they are at best only icing on the cake. In reality, they are often the cake itself. *Amicus* briefs have shaped judicial decisions in many more cases than is commonly realized.[15]

However, it is important to note that there is a dissensus among writers regarding the utility of *amicus* briefs. There is a stream of writers who contend that although the presumption is that *amicus* interventions influence case outcomes, this is open to doubt. According to McCrudden, the question of causal connection between an *amicus* brief and its impact is difficult to determine and the empirical evidence around it is scanty and contested.[16]

Haddad adds that the interviews she conducted with long-standing officials of the European Court reveal that *amicus* briefs are considered as only 'occasionally helpful.'[17] According to her findings, the majority of the filed briefs either restate trite principles of international human rights law that the registry lawyers are already

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[12] For an appraisal of the litigation in this case, see C Grossman 'The Inter-American system of human rights: challenges for the future' (2008) 83/4 *Indiana Law Journal* 1269 – 1275.
[13] Such as Amnesty International; the Association of the Bar of the City of New York; the Minnesota Lawyers International Human Rights Committee and the Lawyers Committee for Human Rights.
[14] A Zidar 'Interpretation and the international legal profession' in A Bianchi *et al* (eds) *Interpretation in international law* (2015) 138. See also A Bianchi 'Globalisation of human rights: the role of non-state actors' in G Teubner (ed.) *Global law without a state* (1997) 201; J Toop 'Multilateral environmental agreements and regional fisheries management organisations; experts, networks and global administrative law principles' in H Cullen *et al* (eds) *Experts, Networks and International Law* (2017) 113.
[15] BJ Ennis 'Effective *amicus* briefs' (1984) 33 *Catholic University Law Review* 603.
[16] C McCrudden 'Transnational culture wars' (2015) 13/2 *International Journal of Constitutional Law* 444.
[17] HN Haddad 'Judicial institution builders: NGOs and international human rights courts' (2012) 11/1 *Journal of Human Rights* 139.

familiar with or 'merely serve as symbolic representation of a particular viewpoint.'[18] It has also been said that *amicus* briefs increase the cost of litigation, and the workload for judges and their staffs who have to process them. According to Judge Posner of the United States:

> Judges have heavy caseloads and therefore need to minimize extraneous reading; *amicus* briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, *amicus* briefs drive up the cost of litigation; and the filing of an *amicus* brief is often an attempt to inject interest group politics into the federal appeals process.[19]

Lynch reports that Court Clerks in the United States are of the view that *amicus* briefs are in some cases 'duplicative, poorly written, or merely lobbying documents not grounded in sound argument.'[20] Similarly, it has been said that *amicus* briefs are a 'genuine problem' for the Supreme Court, 'repetitious at best and emotional at worst'.[21] Suggestions that *amici curiae* are sources of legal doctrine and policy in American jurisprudence are said to be merely anecdotal.[22] Justice Scalia fiercely argued in his dissenting opinion in *Jaffee v Redmond*[23] that there is 'no self-interested organization out there devoted to the pursuit of truth in the federal courts.'[24]

In sum, the existing literature and jurisprudence on the role and significance of *amicus* participation 'provide confusing and contradictory results.'[25] However, the dominant view is that the *amicus* device is on the balance, a normatively good and valuable thing as it assists the courts to propound the law by ensuring that disparate views are included in the judicial decision-making calculus.[26]

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[18] Ibid. See also K Lynch 'Best friends? Supreme Court law clerks on effective *amicus* briefs' (2004) 20/1 *Journal of Law and Politics* 44-45; PA Appel 'A reply to Professor Tobias' (2000) 78/1 *Washington University Law Quarterly* 322.
[19] *Voices for Choices v Ill. Bell Telecommunications Company.,* 339 F.3d (7th Cir. 2003) 544.
[20] Lynch (n 18 above) 44.
[21] RH Seamon *et al The Supreme Court sourcebook* (2013) 30.
[22] CB Wofford 'Assessing the anecdotes: *amicus curiae*, legal rules, and the US Supreme Court' (2015) 36/3 *Justice System Journal* 274.
[23] US 518 (1996) 1.
[24] Ibid. 35 – 36.
[25] JD Kearny & TW Merrill 'The influence of *amicus curiae* briefs on the Supreme Court' (2000) 148/3 *University of Pennsylvania Law Review* 774.
[26] EE Solimine 'Retooling the *amicus* machine' (2016) 102 *Virginia Law Review Online* 158. See also AO Larsen & N Devins 'The *amicus* machine' (2016) 102 *Virginia Law Review* 1944–46; M Abramowicz & TB Colby 'Notice-and-comment judicial decision-making' (2009) 76/3 *University of Chicago Law Review* 987. ('There has been no shortage of praise in the legal literature for the ability of *amicus* briefs

5.2 The development of *amicus curiae* in the African system

The African human rights judicial and quasi-judicial bodies have joined peer jurisdictions in the international legal system in the admission of *amicus curiae* in their litigation. As will be seen below, these mechanisms have been beneficiaries of assistance proffered by a number of actors, including NGOs, university-based human rights clinics and centres, media associations, AU and UN organs and personnel, individuals, states and state-agencies. Far from constituting a homogenous group, the actors are diverse, with the majority of these being NGOs. These NGOs originate from all over the world, with the majority of them being based in Europe and the United States.

The participation of non-African NGOs arguably has implications for the social legitimacy of the African system as argued in Chapter 6 as they cannot be said to present the interests of African publics. Despite these legitimatory concerns it must be noted that human rights discourse is eclectic in nature and occupies a space beyond boundaries of states, where individuals and groups interact to shape the common destiny of humanity. In the words of Kofi Annan, 'we gain strength by combining the foreign with the familiar.'[27] No human rights system can afford the perils of any attempt to inculcate a philosophy of isolationism against the unrelenting juggernaut of globalisation.[28] We turn to give insights into the emerging practice before the African Commission; the African Court and the African Children's Committee.

5.2.1 The African Commission

This section considers the emerging *amicus* practice before the African Commission. It takes stock of the *amicus* briefs filed before the Commission so far and analyse their

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to 'inform the court of implications of a decision' . . . [and] provide relevant factual information not offered by the parties.'); JF Spriggs & PJ Wahlbeck '*Amicus curiae* and the Role of Information at the Supreme Court' (1997) 50 *Political Research Quarterly* 365–66 ('all past research on *amici curiae* implicitly, if not explicitly, argues that *amicus* briefs convey critical and reliable information to the Court … Indeed, conventional wisdom suggests that courts often rely on factual information or analytical approaches offered by *amici*, but not otherwise advanced by the parties to the case.').

[27] K Annan 'Nobel lecture' Oslo, Norway 10 December 2001. Available at: http://www.nobelprize.org/nobel_prizes/peace/laureates/2001/annan-lecture.html (accessed 21 November 2015).

[28] *Ahmed v Attorney General* [2002] 2 BLR 440.

impact in the case outcomes of this body. It also notes the low frequency rate of *amicus* participation before this mechanism and gives explanations for this.

5.2.1.1 Stocktaking of filed *amicus curiae* briefs

Despite the fact that originally the relevant instruments of the African Commission were silent on the admission of *amicus curiae*, as seen earlier in Chapter 4, this body remained conscious of the role and significance of epistemic communities of international law in the enforcement of human rights on the continent. This was exemplified by accepting materials from NGOs which were not victims or complainants in a case. For instance, the 1998 - 99 Activity Report of the Commission reveals that the Commission received a letter from the International Centre for the Legal Protection of Human Rights (Interights) relating to a case against Nigeria.[29] This letter contained comments on and objections to the Commission's mission which had visited that country.[30]

The Commission continued receiving comments and observations informally from several NGOs and maintained a close working relationship with them in the exercise of its adjudicatory functions, although in many instances the designation of *amicus curiae* was not being used.[31] With the passage of time, a number of private entities began to file formal *amicus* briefs in the proceedings of the Commission. In three of the cases, the briefs were filed by university-based centres. In *Kenneth Good v The Republic of Botswana*,[32] a case dealing with illegal deportation, the Commission received a brief from the Centre for Human Rights, University of Pretoria.

In *Interights v Ethiopia and Interights v Eritrea*,[33] a case concerning illegal mass expulsions and deportations, the Commission was a beneficiary of a brief from the Allard K Lowenstein International Human Rights Law Clinic, Yale Law School, US. In

[29] *Constitutional Rights Project and Another v Nigeria*, Communication nos. 143/95-150/96.
[30] A-K Lindblom *Non-Governmental Organisations in International Law* (2005) 362.
[31] Ibid.
[32] Communication no. 313/05, para 17.
[33] Communication no. 233/99-234/99, para 14 (on the complaint brought against Ethiopia).

Gabriel Shumba v Zimbabwe,[34] a case dealing with the torture of the complainant, the Clinical Advocacy Project, Human Rights Program of Harvard University filed observations.

In two other cases: the *Centre for Minority Rights Development & Anor v Kenya* (the *Endorois* case)[35] and the case of *Muzerengwa and Others v Zimbabwe*,[36] dealing with forced evictions, the Commission received *amicus* briefs from the Centre of Housing Rights and Evictions (COHRE), an international NGO based in Switzerland. In the case of *Front for the Liberation of the State of Cabinda v Republic of Angola* (*Cabinda* case),[37] a complaint against the annexation and occupation of territory, the Commission received *amicus* briefs from three different organisations namely the *Mouvement Pour Le Rassemblement Du Peuple Cabindais et Pour Sa Souveraineté et Union Nationale de Liberation du Cabinda* (UNLC) and the *Front de Libération de L'Etat du Cabinda* (FLEC) as well as from an individual, one Dr Jonathan Levy, who filed a brief *pro se*.

The Commission has also received briefs in some cases that are pending before it. For instance, in *Asociacion Pro Derechos Humanos de Espafia (APDHE) v Equatorial Guinea*,[38] dealing with the impact of corruption on the enjoyment of rights, the Commission received an *amicus* brief from the Allard K Lowenstein International Human Rights Law Clinic of the Yale Law School in support of the communication. The *amicus* brief deals with both the admissibility and merits of the communication. In *Patrick Gabaakanye v Botswana*,[39] a case dealing with the right to seek clemency in death penalty cases, Christof Heyns, a well-known Professor of Human Rights Law and Co-director of the Institute for International and Comparative Law in Africa at the University of Pretoria as well as the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, filed an *amicus* brief.

[34] Communication no. 288/04, para 18. The brief was submitted on behalf of the Clinical Advocacy Project, at the Human Rights Program of Harvard University by the Institute for Human Rights and Development in Africa.
[35] Communication no. 276/2003, para 46.
[36] Communication no. 306/05, paras 11 and 13.
[37] Communication no. 328/06, para 27.
[38] Communication no. 347/07 (merits).
[39] Communication no. 600/16.

The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, has filed an *amicus curiae* brief before the African Commission in *Jenifer Williams, Magodonga Mahlangu and Women of Zimbabwe Arise (WOZA) v The Republic of Zimbabwe,*[40] a case dealing with the rights of assembly and association in Zimbabwe. The Vanderbilt International Law practice of Vanderbilt Law School in the US has also filed a brief in *Abubaker Ahmed Mohamed and 28 others v the Federal Democratic Republic of Ethiopia*.[41] The African Centre for Democracy and Human Rights Studies; the Human Rights Institute of South Africa; the Institute for Human Rights and Development in Africa; the International Service for Human Rights; *le Réseau des Défenseur des Droits Humains en Afrique Centrale*; and the Zimbabwe Human Rights NGO Forum filed a joint brief in *Ibrahim Halawa and 493 Others v Egypt*.[42] Lastly, in *Mohammed Abdulla Saleh v The Republic of Djibouti*,[43] the Commission received an *amicus* brief from the Human Rights Centre of the University of Buenos Aires Law School.

Although the Commission has so far been a recipient of *amicus* briefs in a handful of cases so far, it has made the claim that 'accepting *amicus* submissions is in line with its well-established jurisprudence.'[44] Former Chairperson of the African Commission, Sanji Monageng points out that the practice of the African Commission receiving *amicus* statements was inspired by practices of other regional and international dispute settlement fora.[45] We turn to examine the potential and actual roles that *amici curiae* play in the litigation of the Commission.

5.2.1.2 Potential contribution of *amicus* submissions

Concerns have been raised in academia about the faltering quality of the decisions of the African Commission. It has been argued that the Commission does not apply a consistent method of interpretation of the African Charter, and therefore produces conflicting decisions. Although the bulk of the Commission's decisions have been convincingly substantiated and well-reasoned, particularly in recent years, the

[40] Communication no. 446/13.
[41] Communication no. 455/13.
[42] Communication no. 1846/14.
[43] Communication no. 383/10.
[44] *Samuel T Muzerengwa and 110 Others (Represented by Zimbabwe Lawyers for Human Rights) v Zimbabwe*, Communication no. 306/05, paras 11 and 13.
[45] Interview with former Commissioner, Sanji Mongageng, 10 October 2017.

epistemic quality of its jurisprudence remains uneven.[46] The reasoning in some cases is not sound and consistent, and the decisions are sometimes marred by glaring and obvious linguistic and stylistic inelegancies.[47]

Although the Commission does not formally observe the doctrine of *stare decisis* in its adjudicative task, the discrepancy in approach concerning a number of issues gives a distinct impression of incoherence and lack of institutional consistency.[48] This may blight its legitimacy. Through comprehensive and sound legal submissions, *amici curiae* have the potential to improve the epistemic quality of the findings of the African Commission and to assist it in the development of its jurisprudence. It must be note that the African Charter requires the Commission 'to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms.'[49]

Human rights courts and tribunals have inevitable choices to make in the development of the law, and this makes it necessary to take into account a wider range of viewpoints by *amici curiae* than would have appeared necessary when the declaratory theory of judicial function was incontestably accepted. According to the Vice Chairperson of the African Commission, Mute, this body stands to benefit from the industry, dexterity and resourcefulness of these entities in its adjudicative task.[50] Commissioner Mute states that he expects *amici curiae* to bring to the attention of the Commission matters of fact and law that are within the knowledge and expertise of the intervening entities.[51] He emphasises that the Commission will be well disposed to accept briefs that contain comparative case law.[52]

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[46] F Viljoen 'From a cat into a lion? an overview of the progress and challenges of the African human right system at the African Commission's 25-year mark (2013) 17 *Law, Democracy & Development* 310.
[47] Ibid.
[48] Ibid.
[49] Article 45(b).
[50] Interview Lawrence Mute, Vice Chairperson, African Commission, 23 October 2017.
[51] Ibid.
[52] Ibid.

The value of a comparative legal approach cannot be over-emphasised. It offers richer model solutions to diverse legal problems.[53] The insights of world human rights systems can offer multifarious legal solutions than cannot be innovated in a lifetime, even by the most outstanding jurist. In international human rights law, comparative law serves as an important resource for the cross-fertilization of ideas and approaches between human rights systems. As Trindande writes:

> Given the multiplicity of co-existing human rights instruments in our days, it comes as little or no surprise that the interpretation and application of certain provisions of one human rights treaty have at times been resorted to as orientation for the interpretation of corresponding provisions of another (usually newer) human rights treaty.[54]

Regional human rights mechanisms often cite each others' jurisprudence, provided that there are no material textual dissimiliaries which may lead to different case outcomes. They often find each others' interpretations to be persuasive in resolving disputes brought before them.[55] By articles 60 and 61 of the African Charter, the African Commission is authorised to draw inspiration from African practices, precedents, and the legal doctrines of other international dispute settlement fora.[56] In the light of these provisions the African Commission is:

> More than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards taking into account the well recognised principle of universality which was established by the Vienna

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[53] K Zweigert & H Kotz *An introduction to comparative law* (2011) 15. See also T Christkas 'human rights from a neo-voluntarist perspective' in J Kammerhofer & J D'Aspremont (ed.) *International legal positivism in a post-modern world* (2014) 430.

[54] AC Trindande *Co-existence and co-ordination of mechanisms of international protection of human rights* (1987) 101.

[55] D Shelton 'Performance of regional human rights courts' in T Squatrito *et al* (eds) *The performance of international courts and tribunals* (2018) 144.

[56] Article 60 African Charter: 'The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.' Article 61 African Charter: 'The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.'

> Declaration and Programme of Action of 1993 and which declares that 'All human rights are universal, indivisible and interdependent, and interrelated.[57]

However, the African Commission has paid little regard to the possibility of creatively interpreting the phrases 'African practices' and 'legal precedents' contained in article 61 of the African Charter as empowering it to make reference to decisions of national African Courts.[58] While it may have been possibly true that there was an acute dearth of domestic case law consistent with international norms and standards in the past, today there is a mountain of progressive human rights jurisprudence by African domestic courts from which the African human rights judiciary may draw inspiration.[59] There remains scope for *amici curiae* to draw the attention of the Commission to this case law.

According to one former member of the African Commission, Bahane Nyanduga, *amicus curiae* submissions are potentially useful to the African Commission in that they may provide it with valuable background information as well as viewpoints that the parties may not have presented before this body.[60] In most cases, *amici curiae* have stepped into a case to introduce subtle variations of the basic argument or to raise emotive or even novel arguments that might result in a successful outcome but are too risky for the principal litigant to embrace.'[61] It has also been said that oftentimes record parties fail to provide an accurate background of the dispute and their pleadings are 'insufficient to provide the Tribunal with an exhaustive picture of the issues involved.'[62]

In Nyanduga's view, the task of the African Commission is not only to settle disputes between the parties, but also to decide how human rights rules, principles and norms should be applied to the generality of the AU community.[63] Similarly, Commissioner Asuagbor points out that it is always important for a quasi-judicial body that makes

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[57] See *Purohit and Another v The Gambia*, Communication no. 241/2001, para 48.
[58] F Viljoen *International human rights law in Africa* (2012) 326.
[59] Ibid.
[60] Interview with Bahane Nyanduga, former member of the African Commission, 15 August 2017.
[61] S Krislov 'The *amicus curiae* brief: from friendship to advocacy" (1963) 72/3 *Yale Law Journal* 711–712. See also GF Smith & BE Terrell 'The *amicus curiae*: a powerful friend for poverty law advocates' (1995) 29 *Clearinghouse Review* 777.
[62] M Paparinskis 'Inherent powers of ICSID Tribunals: broad and rightly so' in IA Laird & TJ Weiler (eds) 5 *Investment treaty arbitration and international law* 2011) 20.
[63] Ibid.

important decisions with far reaching consequences such as the African Commission to obtain 'another opinion' to throw some light on the question brought before it.[64] The underlying assumption is that the wider the pool of sources of information, the richer the insight and the brighter the chances for a good outcome.[65] It is particularly important that decisions of international courts and tribunals must be free from error given their general application and finality as well as their profound impact.[66]

For his part, Commissioner Kaggwa points out that the African Commission attaches considerable weight to the views of non-party actors in its litigation because 'these are not ordinary folks,' but experts who in many cases bring perspectives that even the most diligent and omniscient Commissioner would not have ordinarily known.[67] Given the time limitation of the Commission arising from its *ad hoc* nature and the acute human resource constraints that this body faces, the involvement of *amici curiae* has the potential to assist this body in undertaking an otherwise costly international and comparative research, thereby giving clarity to the reasoning structure of the Commission's findings.[68] It has been said that 'it is illusory to believe that [a] court, as Dworkin's Hercule, would have, in every case before it, the time and resources needed to navigate [the] ocean of sources'.[69]

The former Chairperson of the African Commission, Ms Atoki has argued that 'the amount of work … that Commissioners put in is simply not sustainable' and that 'it is a known fact that part-time Commissioners take on three times the load as their counterparts in the UN, European and Inter-American systems. There is need to address that concern by Member States urgently.'[70] Ms Atoki also pointed out that

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[64] Interview with Commissioner Lucy Asuagbor, member of the African Commission, 07 November 2017.
[65] GC Umbricht '*Amicus curiae* brief on *amicus curiae* briefs at the WTO' (2001) 4/4 *Journal of International Economic Law* 774.
[66] Wiik (n 1 above) 45.
[67] Interview with Kaggwa member of the African Commission, 25 September 2017.
[68] Interview with Nyaduga, n 60 above.
[69] Quoted in L van den Eynde 'Encouraging judicial dialogue: the contribution of human rights NGOs' briefs to the European Court of Human Rights' in A Müller & HE Kjos (eds) *Judicial Dialogue and Human Rights* (2017) 347.
[70] CD Atoki 'Opening speech by the former Chairperson of the African Commission at the Opening Ceremony of the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Côte d'Ivoire, 9 – 22 October 2012.

'[l]ike many inter-governmental institutions in Africa, the Commission is handicapped financially, materially and lacks human resources.'[71]

Another former member of the African Commission, Nyanduga, writes that Commissioners 'supported by a skeleton staff of between five to eight legal officers, the majority of whom are on short-term donor-funded contracts.'[72] This view is shared by Mr Tilahun who adds thatf the remarkably small team of legal officers is tasked not only with dealing with communications but is also required to carry out the general promotional and logistical roles of the Commission such as facilitating missions, drafting states reports and resolutions, organising seminars and workshops, and liaising with states and NGOs.[73]

Likewise, it has been said the African Commission faces an acute shortage of personnel, 'particularly in the legal section of the Secretariat, and yet the bulk of the activities carried out by the African Commission are supposed to be done with support and assistance of legal officers.'[74] The enormous workload of the African Commission leaves legal officers with limited time on their hands to carry out sound and thorough research on communications.[75] In addition, it must also be recalled that the Commission holds only two ordinary sessions per year, each lasting for two weeks. During these sessions, it hears communications and undertakes some of its promotional tasks.

Over the years, it has become quite evident that the four-week period during which the Commission meets in any given year is not adequate for it to satisfactorily discharge its functions.[76] It must also be noted that members of the Commission deal with

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[71] Ibid. See also VOO Nmehielle *The African human rights system: its laws, practice and institutions* (2001) 297.
[72] BT Nyanduga 'Conference paper: perspectives on the African Commission on Human and Peoples' Rights on the occasion of the 20th anniversary of the entry into force of the African Charter on Human and Peoples' Rights' (2006) 6/2 *African Human Rights Law Journal* 259.
[73] Interview with Simon Tilahun, former Legal Officer, African Commission, 28 October 2017.
[74] F Adolu 'A view from the inside: the role of the secretariat' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights* (2008) 340. See also D Abebe 'Does international human rights law in African courts make a difference?' (2017) 56/3 *Virginia Journal of International Law* 552.
[75] Interview with Tilahun, n 73 above.
[76] Nyanduga (n 72 above) 259.

communications only when the Commission is in session and do not take case files to their countries at the end of the Commission's sessions.[77]

Worse still, during the Commission's sessions little time is dedicated to communications, as most of the time is taken by the Commission's other activities. This therefore means that the research work by *amici curiae* is indispensable to the Commission's dispute resolution process.[78] In this regard, Viljoen writes that a tribunal with 'relatively meagre resources should embrace opportunities to hear supplementary arguments.'[79] According to Tilahun, '*amici curiae* briefs have the potential to make the lives of the Commissioners and legal officers much easier in researching for cases.'[80] It has also been noted that 'where the caseload makes it impossible for judges and their clerks to conduct extensive legal research, *amici curiae* can provide the requisite information.'[81]

In addition, the Commission has poor retention of legal officers, who usually use this body as a stepping stone to launch their careers in the international civil service and international NGOs. This means that legal officers who are in the employment of the African Commission are often inexperienced young lawyers whose research skills are still wanting.[82] Thus, *amicus* entities may compensate for this capacity shortage. In this connection, Commissioner Kaggwa notes that the Commission stands to benefit from the input by institutions that have maintained a long-standing presence in the African human rights system, and have accumulated a wealth of experience about the African human rights system.[83] He cites as examples, the Centre for Human Rights of the University of Pretoria and the Centre for the Implementation of Human Rights of the University of Bristol.[84]

Commissioner Kaggwa notes that *amicus* briefs from vastly experienced entities have the enormous potential to assist the Commission to creatively interpret the African

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[77] Interview with Nyanduga, n 60 above.
[78] Ibid.
[79] F Viljoen 'A human rights court for Africa, and Africans' (2004) 30/1 *Brooklyn Journal of International Law* 52.
[80] Interview with Tilahun, n 73 above.
[81] Wiik (n 1 above) 44.
[82] Interview with Nyanduga, n 60 above.
[83] Interview with Kaggwa, n 67 above.
[84] Ibid.

Charter, explore new lines of legal reasoning, and develop its jurisprudence in the process.[85] Indeed, the intellectual effort of *amici curiae* is vital given the fact that the provisions of the African Charter are said to be 'opaque and difficult to interpret.'[86] In addition, With technological innovations and scientific progress, the Commission is increasingly facing technical and scientific dilemmas which require special knowledge and understanding to resolve.[87] This special knowledge or expertise is necessary in the development of transformative jurisprudence on the continent. The need for an active role for *amici curiae* in the litigation of the African Commission is all the more pronounced when one considers that this body has no credible library.

Moreover, it is critical to note that it is not a requirement that Commissioners should have a legal background. Therefore, the contribution of *amici curiae* will help fill this gap in the available legal expertise by promoting understanding by the Commission of human rights principles, especially in the resolution of complex and novel legal issues which may prove elusive to a mind that is not legally trained. In the past, African countries paid little obeisance to relevant competences and professionalism, and elected officials with little or no expertise or knowledge at all about human rights such as diplomats and politicians to the African Commission. This compromised the epistemic quality of the jurisprudence of the African Commission.

The early decisions of the African Commission are usually brief and not supported by persuasive legal reasoning. Although the appointment requirements have not been formally changed in this regard, a practice has been developed by the AU to appoint only legally trained persons to the African Commission, despite the theoretical permissibility of appointing lay persons to this body as well. Furthermore, *amici curiae* have the potential to bolster or supplement viewpoints weakly made by the parties before the Commission.[88] Indeed, the Open Society Justice Initiative stated in its brief filed before the Commission in *Good v Botswana*[89] that the purpose of its submissions

[85] Ibid.
[86] CA Odinkalu 'The individual complaints procedures of the African commission on human and peoples' rights: a preliminary assessment' (1998) 8 *Transnational Law & Contemporary Problems* 398. See also R Murray 'Serious or massive violations under the African Charter of Human and Peoples' Rights: a comparison with the Inter-American and European mechanisms' (1999) 17/2 *Netherlands Quarterly of Human Rights* 127.
[87] Interview with Paul Ogenda, former Legal Officer, African Commission, 06 October 2017.
[88] Interview with Kaggwa, n 67 above.
[89] Communication no. 313/05.

was to 'supplement' and 'further develop the arguments set forth in the *Kenneth Good* Communication.'[90]

Even where there is sufficient elucidation of basic viewpoints by primary parties to the suit, the *amicus* can still play a useful subsidiary role by drawing the attention of the Commission to the quiet subtleties and nuances of fundamental arguments that might serve the interests of justice.[91] Justice Alito shares this view, remarking that even in a case where a litigant is competently represented, 'an *amicus* may provide important assistance to the court . . . [by] collect[ing] background or factual references that merit judicial notice.'[92] This viewpoint accordingly suggests that submissions made by *amici curiae* represent a critical part of the judicial process.[93]

5.3.1.3 Actual impact of the interventions

The African Commission has been persuaded by some of the filed briefs and has rejected the contents of some of them. As seen in the previous chapter, in *Good v Botswana*,[94] the Commission indicated that it could not process the filed *amicus* brief because it was no more than an echo of the submissions of the record parties. In *Front for the Liberation of the State of Cabinda v Republic of Angola* (the *Cabinda* case),[95] the Commission noted that the case was considered on the merits 'based on all the documents submitted by the parties and the various *amicus* briefs.'[96] After extensive reference to the contentions advanced by the *amici curiae*, the Commission then pointed out that it does not consider itself bound to pronounce itself on the *amicus* briefs because they introduced new and irrelevant factual information and arguments.[97]

In the Commission's view, while the case was not about secession, the *amicus* brief sought to 'introduce secessionist dimensions to the communication.'[98] The

[90] Brief filed the Open Society Justice Initiative. Available at: https://www.opensocietyfoundations.org/litigation/good-v-botswana (accessed 23 June 2018).
[91] Interview with Med Kaggwa, n 67 above.
[92] *Neonatology Associates v Commissioner of Internal Revenue* 293 F.3d 128, 132 (3d Cir. 2002).
[93] Spriggs & Wahlbeck (n 26 above) 381.
[94] Communication no. 313/05.
[95] Communication no. 328/06.
[96] Ibid. para 31.
[97] Ibid. para 99.
[98] Ibid.

Commission then proceeded to determine the claim on the basis of the submissions of the parties alone and did not process the *amicus* submissions any further. In this regard, the approach of the Commission parallels NAFTA tribunals which requires that an *amicus* statement must be 'within the scope of the dispute.'[99] However, the Commission must be careful not to over-circumscribe the area of *amicus* participation and weaken its role and contribution.

Although the contribution made by the brief filed by COHRE in the *Endorois* case[100] was not acknowledged in the Commission's decision, it has been effusively lauded as 'very useful and informative' for its penetrating insights.[101] According to Commissioner Nyanduga, the brief assisted the Commission to develop and expand the land rights of indigenous communities in Africa.[102] Indeed, in comparing the decision of the Commission and the filed brief, one is able to discover that the Commission extensively relied on comparative case law supplied by the *amicus curiae,* making reference to the same passages quoted in the brief as it developed its jurisprudence on the subject of the case.[103]

It also incorporated the language used in the brief into its own decision, qualitatively adopting the arguments of the *amicus* intervenor as the basis for its own opinion. In fact, some sentences were lifted word for word from the brief and used in the decision, with no effort at paraphrasing, while others were slightly altered.[104] Regarding the *ratio* of the decision, the Commission was persuaded by the *amicus* intervenor in holding that forced evictions were *prima facie* incompatible with the African Charter and other international human rights instruments.[105]

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[99] See article 9.23.3 of the Trans-Pacific Partnership. Adopted in 2016. ('After consultation with the disputing parties, the tribunal may accept and consider written *amicus curiae* submissions regarding a matter of fact or law within the scope of the dispute that may assist the tribunal in evaluating the submissions and arguments of the disputing parties from a person or entity that is not a disputing party but has a significant interest in the arbitral proceedings.')
[100] *Endorois* case, n 35 above.
[101] Interview with Tilahun, n 73 above.
[102] Interview with Nyanduga, n 60 above.
[103] Compare para 202 of the decision with para 8 of the brief.
[104] Ibid.
[105] Ibid.

Relying on *amicus* submissions, it concluded that evictions should be allowed only in the most exceptional circumstances, having exhausted 'all feasible alternatives' in consultation with the affected community.[106] It accordingly found violations of the African Charter. There is also extensive overlap of language between the brief and the decision of the Commission when dealing with the right not to be deprived of one's personal possessions. Thus, their impact.[107] The *Endorois* decision has been lauded as breaking new ground on the protection of the land rights of indigenous communities in Africa. [108] For this important decision, credit must also be extended to the *amicus curiae* involved for the able assistance offered to the Commission.

In *Gabriel Shumba* case,[109] the *amicus curiae* filed observations on the admissibility of the Complainant's torture claims. In particular, the briefer successfully urged the Commission to hold that because the Complainant feared for his life and fled the country, he must be taken to have constructively exhausted the local remedies. In advancing this proposition, the brief drew the attention of the Commission to vast materials, including its own precedents. Referring the Commission to its own precedents is important for the purpose of fostering coherence and consistency in its own jurisprudence. The decision in the *Gabriel Shumba* case helps to clarify and crystallise the Commission's jurisprudence on the doctrine of the constructive exhaustion of local remedies.

In some instances, the Commission merely makes it known that there has been an *amicus* intervention in a case and scarcely makes explicit reference to the submissions by the *amicus* intervenors in the evaluative part of the judgment. This makes it difficult to determinatively establish what the impact of these submissions might have been to the outcome of the litigation. As Hodson argues, this formulaic approach presents *amici curiae* with no idea as to how useful or persuasive their arguments have been in advancing the agenda of human rights.[110] Gómez argues that where an *amicus* brief

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[106] *Endorois* case (n 35 above) para 200.
[107] Compare para 202 of the decision and para 8 of the brief.
[108] C Morel 'Communication 276 / 2003 – *Centre for Minority rights Development (Kenya) and Minority rights group international on behalf of Endorois Welfare Council v Kenya*' (2010) 7/1 *Housing & ESC Rights Law Quarterly* 5.
[109] *Shumba* case, n 34 above.
[110] L Hodson *NGOs and the struggle for human rights in Europe* (2011) 54. Compare M Sjöholm *Gender-sensitive norm interpretation by regional human rights law* systems (2017) 161 – 162.

is accepted, the Court or tribunal must commit itself to consider its contents in sufficient detail and include approving or disapproving remarks on the content of the submissions in its final judgment. [111]

Indeed, groups filing *amicus* briefs do so with the hope that their submissions will be considered in the final decision.[112] A commitment to consider these submissions would ensure that the procedure of non-party intervention enjoys the highest possible degree of predictability and transparency.[113] Similarly, Garcia is of the view that 'judges may have an ethical duty to give fair consideration to all *amicus* briefs filed.'[114] While this line of thought is attractive, it must be borne in mind that an *amicus* intervention is not a right but a judicial grace within the judicious discretion of the tribunal.[115] This means, *inter alia*, that '[t]here is no legal principle which gives rise to an obligation upon a tribunal to consider, either explicitly or implicitly, arguments made by an *amicus curiae*.'[116]

5.3.1.4 Rate of interventions

Despite the relative increase in the African Commission's case docket, the rate of *amicus* activity before this body is conservative. *Amici curiae* have participated in less than three percent of the Commission's proceedings since its establishment in 1987. A number of factors account for this virtual inactivity. Chief among these is the fact that the communication procedure of the Commission is shrouded in smog as seen in Chapter 4. Therefore, potential *amici curiae* may not know of cases which are pending before the Commission in which they may be inclined to intervene. Beside this challenge, the African Charter, and until 2010, the Commission's Rules of Procedure, lacked an explicit legal basis for *amicus* intervention. Civil society might thus have feared that their briefs will be rejected should they try to intervene, not on the merits

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[111] KF Gómez 'Rethinking the role of *amicus* in international investment arbitration: how to draw the line favorably for public interest litigation' (2012) 35/2 *Fordham International Law Journal* 561. See also TR Tyler 'Procedural Justice and the Courts' (2007-2008) 44/1-2 *Court Review: The Journal of American Judges* 30.
[112] Wiik (n 1 above) 158.
[113] R Garcia 'A democratic theory of *amicus* advocacy' (2008) 35/2 *Florida State University Law Review* 318.
[114] Ibid.
[115] Krislov (n 61 above) 696 – 697.
[116] J Harrison 'Human Rights Arguments in *Amicus curiae* Submissions: Promoting Social Justice?' in P-M Dupuy *et al* (eds) *Human rights in international investment law and arbitration* (2009) 415.

of the briefs but on the simple fact that a brief was lodged before a body that does not accept such materials.

Moreover, in the period preceding the promulgation of the Commission's 2010 Rules of Procedure, and subsequent to the adoption of these rules, the Commission has also not done much to generate awareness about its *amicus* procedure, or solicited any briefs.[117] According to the Legal Director of the Legal Media Defense Initiative, Ms Nani Jansen, 'it is not widely known that the Commission accepts *amicus* briefs, or what the procedure to do so is. I must confess that I did not know about this either, until your questionnaire made me aware of this…'[118] She adds that 'I don't think many people know about the procedure; I don't recall anyone ever mentioning this to me over the past four years that I have been litigating internationally, including in the context of working groups focusing on the AU human rights system.'[119]

In addition, the *amicus* procedure may simply be unattractive to civil society because the standing requirements before the Commission are so liberal. Therefore individuals, NGOs and other entities find it easy to become direct parties to cases, which is a relatively stronger position than the *amicus* status. Therefore, there may be no pressing need to seek audience with the Commission through the *amicus* avenue.[120] Most significantly, the Commission has adopted the *actio popularis* principle as part of its judicial practice.[121] This procedure appears to be as equally effective in enforcing public interest as *amicus* process. It is also important to note that NGOs do not act as *amici curiae* as a matter of routine. They deliberately elect to participate as such for strategic reasons or in public interest cases which may alter the legal policy of a country in a significant way. Such cases may be few, correspondingly causing fewer briefs to be filed.

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[117] F Viljoen & A Abebe 'The participation of *amicus curiae* before regional human rights bodies in Africa' (2014) 58/1 *Journal of African Law* 34.
[118] Interview with Nani Jansen, Director of Legal Media Defence Initiative, 17 December 2015.
[119] Ibid.
[120] Viljoen & Abebe (n 117 above) 33.
[121] See *Social and Economic Rights Action Centre (SERAC) Another v Nigeria*, Communication nos. 64/2; 68/92, 78/92; *Kristan Achutcan on Behalf of Aleke Banda, Amnesty International on behalf of Orton and Vera Chirwa v Malawi* Communication nos. 54/91, 61/91, 98/93, 164-169/97, 210/98, *Malawi African Association and others v Mauritania* Communication nos. 54/91, 61/91, 98/93, 164-196/97 and 210/98. See also *Spilg and Mack & Ditshwanelo (on Behalf of Lehlohonolo Bernard Kobedi) v Botswana,* Communication no. 277/ 2003, para 76, where the following passage appears: 'The African Commission, has through its practice and jurisprudence, adopted a generous access to its complaint procedure. It has adopted the *actio popularis* principle, allowing everyone the legal interests and capacity to file a communication for its consideration. For this purpose, non-victim individuals, groups and NGOs constantly submit communications to the African Commission.'

According to Tilahun, the total number of filed briefs might possibly be higher than what is revealed by the decisions of the Commission. In his view, some briefs might have fallen through the cracks at the Commission's registry and could not reach case files as the Commission's record management is unsatisfactory.[122] Indeed, another former legal officer of the African Commission told the writer hereof during an interview that in some cases, pleadings are misfiled, misplaced or simply lost, causing the legal officers to write to the parties asking for copies.[123] Despite the fact that there is a possibility that briefs may be undercounted, this does not appear to significantly change the picture that *amicus* NGO involvement before this body remains minimal.

5.2.2 The African Court

This section appraises the budding participation of *amicus curiae* before the African Court. It begins by giving an account of the cases brought before the Court and in which *amicus* briefs were filed. It proceeds to analyse the impact that these briefs have had on the judgments of the Court. It further gives insight into the frequency rate of the filing of *amicus* briefs before this body. The section also examines the extent to which *amici curiae* may be used to facilitate access to the Court as well to overcome the article 34(6) hurdle which denies individuals and NGOs access to the Court if the concerned state has not deposited the requisite instrument accepting the jurisdiction of the Court.

5.2.2.1 Stocktaking of *amicus curiae* briefs before the African Court

Long before this body became operational, some academic commentators in this area had already begun urging it to open its portals to *amici curiae* when it began receiving cases.[124] For instance, Mohamed wrote that *amicus* briefs 'are useful devices for enhancing the Court's future task to protect human and peoples' rights in Africa.'[125]

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[122] Interview with Tilahun, n 73 above.
[123] Interview with Sègnonna Horace Adjolohoun, former Legal Officer, African Commission, 17 May 2017.
[124] For instance, see DJ Padilla 'An African human rights court: reflections from the perspective of the Inter-American Court system' (2002) 2/2 *African Human Rights Law Journal* 191.
[125] AA Mohamed 'Individual and NGO participation in human rights litigation before the African Court of Human and Peoples' Rights: lessons from the European and inter-American courts of human rights' (1999) 43/2 *Journal of African Law* 378. See also SM Weldehaimanot 'Unlocking the African Court of Justice and Human Rights' (2009) 2/2 *Journal of African International Law* 167.

Today the *amicus curiae* has become part of the Court's 'judicial doctrine and practice.'[126] According to a former member of the Court, Justice Tambala, *amici curiae* have now 'become indispensable in the litigation process of the Court.'[127] He notes that the *amicus* institution was particularly embraced by judges trained in common law jurisdictions, and with time has become popular even with judges drawn from civil law jurisdictions, thus cementing its position in the Court's judicial practice.[128]

The African Court has been a beneficiary of *amicus* briefs in both contentious and advisory proceedings. It has granted virtually all requests for leave to file *amicus* briefs, and it is hoped that it will not depart from this solicitous approach in future. It received the first brief in *African Commission v Libya*,[129] in 2011. This case concerned the widespread and systemic human rights violations committed by the Libyan security forces during the popular uprisings against that country's former leader, Muammar Gadaffi.[130] The brief was submitted by PALU.

In *Lohé Issa Konaté v Burkina Faso* (the *Konaté* case),[131] a case dealing with the compatibility of the criminal defamation laws of Burkina Faso with the African Charter, the African Court received *amici curiae* briefs from a total of eight NGOs, spread throughout the world. These included: the Centre for Human Rights of the University of Pretoria; *Comité Pour la Protection des Journalistes* (CPJ); the Media Institute of Southern Africa (MISA); the Pan African Human Rights Defenders Network (PAHRDN); the Pen International (PI) and the PI Centres (Pen Malawi, Pen Algeria; Pen Nigeria, Pen Sierra Leone and Pen South Africa), the World Association of Newspapers and News Publishers (WANNP), PALU and SALC.[132]

In *African Commission v Kenya* (the *Ogiek* case),[133] the Centre for Minority Rights Development (CEMIRIDE) joined by the Minority Rights Group International (MRGI) as co-petitioners, lodged a communication before the African Commission for the

[126] Interview with Dr Robert Eno, Registrar of the African Court, 17 May 2017.
[127] Interview with Justice Duncan Tambala, former member of the African Court, 16 May 2017.
[128] Ibid.
[129] *African Commission on Human and Peoples' Rights v Libya* Application 4/2011, Judgment of 25 March 2011.
[130] The regime of Muammar Gadaffi ultimately collapsed with his death in October 2011.
[131] Application no. 04/2013, Judgment of 5 December 2014.
[132] Ibid. para 20.
[133] Application no. 006/2012, Judgment 26 May 2017.

illegal evictions of the Ogiek indigenous community from their ancestral lands in the Mau Forest in Kenya. The Commission referred the case to the African Court for a binding decision. Before the Court, Dr Korir Sing'oei, Strategy and Legal Advisor, CEMIRIDE; and Ms Lucy Claridge, Head of Law, MRGI joined by Mr Daniel Kobei, Executive Director, Ogiek People's Development Programme (OPDP) sought and were granted leave to be heard in the case before the Court in an *amicus* capacity. They appeared in support of the petitioners under Rule 29(3)(c) of the Court's Rules of Procedure.[134]

As seen in Chapter 4, The African Court also received an *amicus* brief from the National Commission for the Fight against Genocide (NCFAG), in *Ingabire Victoire Umuhoza v Rwanda* (the *Umuhoza* case),[135] a case concerning the liberties and political participatory rights of a detained opposition leader in Rwanda. The NCFAG is a Rwandan organisation concerned with sensitising the public about the 1994 genocide in Rwanda. While the case was still pending before the Court, the respondent state deposited an instrument of withdrawal of its declaration made under article 34(6) of the African Court's Protocol denouncing the jurisdiction of the Court with respect to claims against it brought directly before the Court by individuals and NGOs.

The Court decided to deal with the legality or propriety and implications of the withdrawal of the aforesaid declaration as a preliminary issue before entering into the merits of the case. On this preliminary proceeding, an NGO called the Coalition for an Effective African Court on Human and Peoples' Rights applied and was granted leave to file an *amicus* brief.[136] As seen previously, in the Advisory Opinion on the *Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights* (the Advisory Opinion *Concerning African Children's Committee*),[137] the Court received statements from AU states such as Kenya, Senegal and Gabon as well as the African Commission based in Banjul. Finally, in *Armand Guehi v Tanzania* (the *Guehi* case),[138] a case concerning fair trial

[134] Ibid. paras 3 & 27.
[135] Application no. 003/2014, Notification of Order 03 June 2016.
[136] Ibid. para 29.
[137] Application no. 002/2013, Judgment of 5 December 2014.
[138] Application no. 001/2015.

rights, the African Court received a request to file observations from Côte d'Ivoire, the applicant's state of nationality.[139] This case is still pending before the Court.

5.2.2.2 Potential contribution of *amicus* briefs

The potential contribution by civil society in the litigation of the African Court has been acknowledged by the Court itself. In his speech at a symposium commemorating the tenth anniversary of the Court, the President of the Court, Justice Sylvain Oré, remarked that 'African civil society should not give the impression that its mission came to an end after the establishment of the Court,' adding that '[t]he role of civil society is also important when the issue is that of the scope and quality of the Court's decisions.'[140] The Judge President also paid a 'deserving tribute to the NGOs which have been at the forefront of the Court's vibrant [jurisprudence] on issues as significant as the right to political participation, freedom of expression and fair trial.'[141]

Riding on the wings of the decision of the Inter-American Court in *Kimel v Argentina*,[142] the African Court has stated that 'the role of *amicus curiae* in the proceedings is to provide the Court with arguments or views which may serve to assist the Court in its consideration of legal issues under consideration by the Court.'[143] It has been argued that 'the effective protection of human rights in Africa could only be enhanced if the Court were to allow representations from a broad category of *amici curiae,* especially NGOs'.[144] The Vice-President of the Court, Ben Kioko asserts that the Court has adopted a liberal approach towards *amici curiae* because international human rights litigation bears implications for the wider public and it is therefore important for the Court to take into account a wide array of viewpoints in judicial analysis.[145]

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[139] *Guehi* case (n 138 above), para 8, Order for Provisional Measures, 18 March 2016.
[140] Speech by Judge President Sylvain Oré at the opening ceremony of the symposium celebrating the tenth anniversary of the African Court on the theme: 'celebrating a decade of human rights protection in Africa,' held at Arusha, Tanzania, 21 November 2016 (on file with author).
[141] Ibid.
[142] *Kimel v Argentina*, Merits and Reparation, IACtHR, (Ser C) no. 177 [2008], Judgment of 2 May 2008.
[143] *Umuhoza* case (n 135 above) para 38.
[144] GJ Naldi 'Observations on the Rules of the African Court on Human and Peoples' Rights' (2014) 14/2 *African Human Rights Law Journal* 381.
[145] Interview with Justice Ben Kioko, Vice President of the African Court, 18 May 2017.

It is only 'through a variety of inputs that the courts will obtain the fullest exposure to the potential effects of the decision.'[146] Justice Kioko also notes that the aim of third party interventions is to assist the African Court by providing it with an independent analysis of the human rights principles and standards at issue in a case, as well as any relevant international and comparative human rights law.[147] Although judicial bodies must be presumed to know the law, as expressed in the *iura novit curia* principle, Judge Kioko argues that it is still necessary that the Court should receive *amicus* briefs because its members 'may not have expertise in every aspect of the law under the sun.'[148] He emphasises that the Court is helped by *amicus curiae* to bring to the fore 'considerations germane to the case that the direct parties for one reason or another have not brought to our attention.'[149]

Judge Kioko argues that even the most corralled jurists or legal polymaths can never rely on their own industry alone to resolve all human rights dilemmas brought before the courts.[150] In this connection, Justice Breyer of the US Supreme Court, remarks that briefs 'play an important role in educating judges on potentially relevant technical matters, helping to make us not experts but educated lay persons and thereby helping to improve the quality of our decisions.'[151] Likewise Reisman writes that 'the *amicus curiae* brief has been an institution which has provided useful information to courts, permitted private parties who were not litigating to inform the court of their views and the probable effects the outcome might have on them and, overall, has served as means for integrating and buttressing the authority and conflict-resolving capacities of … tribunals.'[152]

Despite the existence of readily accessible extensive legal materials, Judge Kioko is of the view that the Court still needs individuals and organisations to intervene in its proceedings, analyse the available information and put it in a proper perspective for

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[146] J Koch 'Making room: New directions in third party intervention' (1990) 48/1 *University of Toronto Faculty of Law Review* 152. See also U Beyerlin 'The role of NGOs in international environmental litigation' (2001) 61 *Zeitschrift fuer Auslaendisches Oeffentliches Recht und Voelkerrecht* 364.
[147] Interview with Justice Kioko, n 145 above.
[148] Interview with Eno, n 126 above.
[149] Interview with Justice Kioko, n 145 above.
[150] Ibid.
[151] Quoted in AO Larsen 'The trouble with *amicus* facts' (2014) 100/8 *Virginia Law Review* 1761.
[152] Letter from Professor W Michael Reisman to the Registrar of the ICJ, seeking intervention in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). Quoted in RS Clark 'The International League for Human Rights and South West Africa 19471957: human rights NGO as catalyst in the international legal process' (1981) 3/4 *Human Rights Quarterly* 119.

the Court. He points out that in some instances, the Court may be confronted with conflicting perspectives and may therefore find it necessary to draw on the expertise of *amici curiae* to resolve these dilemmas.[153] As at the African Commission, the work of the Court is undermined by time constraints occasioned by the Court's *ad hoc* sittings as well as the Court's limited human and material resources. The shortage of the Court's human and material resources has systematically been documented in its annual activity reports.

It must also be noted that apart from the Judge President, the rest of the judges of the Court are employed on a part-time basis[154] and reside outside Tanzania, where the Court is seated.[155] Like the Commissioners, judges of the Court do not take case files home at the end of the Court's sessions to work on them in their respective countries. Compounding this difficulty is the fact that there is no unified database for international human rights law. Thus, allowing individuals and NGOs to intervene as *amici curiae* can assist the Court to surmount some of these challenges in order to obviate their having to undertake expensive and time-intensive research, thereby enhancing the epistemic quality of its decisions.[156]

Without the support of expert individuals and NGOs, the performance of the Court would be 'marginal at best.'[157] In many of the cases, the responsibilities for conducting research and drafting judgments for the cases fall on the shoulders of legal officers of the Court who are very few: they are only eight in number. One of the legal officers, Mr Teferra Zalalem, pointed out during an interview with the writer hereof that there are about 110 active cases before the Court, and this is undoubtedly an enormous workload for the limited staff of the Court's legal division.[158] These sentiments are shared by the Court's Head of Legal Division, Ms Kakai who also states that the legal officer-to-case ratio is exceedingly high, and the Court's case-docket is expected to increase with time.[159]

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[153] Interview with Justice Kioko, n 145 above.
[154] The African Court convenes four sessions per year which last for three weeks each to consider cases and other business of the Court.
[155] Interview with Nouhou Diallo, Deputy Registrar of the African Court, 17 May 2017.
[156] Viljoen & Abebe (117 above) 37. See also OS Simmons 'Picking friends from the crowd: *amicus* participation as political symbolism' (2009) 42/1 *Connecticut Law Review* 207.
[157] Viljoen & Abebe, Ibid. 37.
[158] Interview with Justice Augustino Ramadhani, former President of the African Court, 17 May 2017.
[159] Interview with Ms Grace Kakai, Head of Legal Division, African Court, 17 May 2017.

In addition, some of the cases brought before the Court raise a plethora of complex legal questions which have no precedents in the African human rights system, since the jurisprudence of the interpretive organs of this system is still budding. In this regard, Zalalem points out that the legal division of the Court stands to benefit from the submissions filed by *amicus* entities to resolve these human rights dilemmas.[160] Intervenors may assist the Court with legal citations, comparative materials and other vital materials which the Court's legal team may not have had access to, given their workload and time constraints.[161] The briefs may sometimes also assist the Court with legal perspectives which might have been simply omitted by the legal personnel of the Court in the course of research.[162]

In addition, *amici curiae* before the Court, like before the African Commission, can advance general regional canons of the interpretation of rights, widen the scope of analysis, and possibly help in the progressive development of human rights norms and practice. It has been noted that if a court is supported by cause lawyers, academics and civil society it is more likely to be expansionist and hand down progressive decisions that go beyond the letter of the law.[163] Furthermore, sometimes litigants before the African Court are represented by lawyers who lack skill and knowledge about international human rights law. In such cases, *amici curiae* may help to develop the arguments which were weakly made by the principal parties by introducing supporting jurisprudence.[164] Indeed, sometimes meritorious cases might otherwise fail on account of a sheer lack of relevant legal knowledge and industry.[165]

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[160] Interview with Teferra Zelalem, Legal Officer, African Court, 17 May 2017.
[161] Ibid.
[162] Interview with Justice Kioko, n 145 above.
[163] A Possi 'Striking a balance between community norms and human rights: the continuing struggle of the East African Court of Justice' (2015) 15/1 *African Human Rights Law Journal* 202; KJ Alter & LR Helfer 'Nature of nurture? Judicial law-making in the European Court of Justice and the Andean Tribunal of Justice (2010) 64/1 *International Organization* 563; J Oloka-Onyango *When courts do politics: public interest law and litigation in East Africa* (2017) 259.
[164] Interview with Zelalem, n 160 above. See also F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67/*1 International and Comparative Law Quarterly* 94.
[165] Smith & Terrell (n 61 above) 781. Quoting *In re Estelle*, 516 F.2d 480, 487 (5th Cir. 1975) (Tuttle, J., concurring).

5.2.2.3 Actual impact of interventions

As in the case of the African Commission, the impact of the *amicus* submissions is beginning to be felt in the jurisprudence of the African Court. In the *Konaté* case, the intervenors strongly supported the applicant's case, arguing that criminal penalties for defamation cases were inconsistent with free speech guarantees under the African Charter and various other international human rights law instruments.[166] They further contended that criminal penalties for defamation cases were exceedingly disproportionate to the state's interest in protecting the reputation of public officials, labelling such laws them as an ugly relic of colonialism.[167] Deploying an analysis similar to that advocated by *amici curiae*, the Court came to the conclusion that the government of Burkina Faso had failed to demonstrate how the excessively severe sentence imposed on the applicant was necessary and proportionate to the protection of the reputation of the official in question: a prosecutor.[168]

The *amicus* intervenors in the *Konaté* case also illustrate how these entities may broaden the scope for judicial decision-making and also buttress the arguments of a direct party. While the applicant focused on the violation caused by the imprisonment imposed on him, the *amicus* intervenors argued that any criminalisation in its broadest or general sense, including both custodial and non-custodial sentences, would infringe the African Charter. However, in a narrow vote of 6 to 4, the Court rejected the *amici*'s argument. The *Konaté* case is easily the all-time, staggering record-setter in terms of the participation of *amici* in the litigation before the African human rights system, with eight intervenors. However, the Court ultimately directed the groups to file a joint brief for reasons of judicial economy.

It appears that the Court allowed many NGOs to intervene because the case involved a matter of enormous importance to the wider AU members that retain similar laws, and also had great precedential value, namely the reform of insult and criminal defamation laws on the African continent. Shelton makes the important point that since

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[166] *Konaté* case (n 131 above) para 41.
[167] Ibid. paras 142– 43.
[168] Ibid. paras 164 – 165. See also C Nkonge '*Amicus curiae* participation in foreign jurisdictions' in Kerkering C & Mbazira C (eds) *Friend of the court and the 2010 Constitution: the Kenyan experience and comparative state practice on amicus curiae* (2017) 145.

NGOs intervene before the tribunals in important cases where there is no clear precedent and the law is unsettled, and where judges may be divided in opinion, such intervenors play a crucial role in assisting the Court to navigate new areas of law where the impact is particularly extensive.[169] The persuasive influence of *amici curiae* in the *Konaté* case has also been acknowledged by other commentators.[170]

As seen in the preceding chapter, the African Court was also a beneficiary of an *amicus* brief in the *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* (the *SERAP Advisory Opinion*).[171] The brief was filed by the Centre of Human Rights of the University of Pretoria. In this case, the Court was called upon to make a preliminary determination as to whether or not SERAP, as an NGO, is an 'African Organisation recognised by the AU' within the meaning of article 4(1) of the African Court's Protocol, and therefore entitled to request an advisory opinion from the Court.

The Court rehashed the submissions made by the *amicus curiae*, which strenuously argued that the language used by the afore-said article 4(1) included NGOs within its purview.[172] However, in a decision that has been roundly criticised by academic commentators,[173] the Court came to the conclusion that SERAP is not an 'African Organisation' recognised by the AU since it does not have observer status before or a Memorandum of Understanding with the AU Commission.[174] The Court implicitly rejected the arguments by the *amicus curiae* without explicitly appraising or evaluating them in its opinion.

The *Umuhoza* case[175] is also relevant to this inquiry. It concerns Rwanda's withdrawal of the declaration it had made in terms of article 34(6) of the Court's Protocol entitling individuals and NGOs to sue it directly before the Court. The withdrawal was opposed by the applicant and as seen earlier, an NGO called Coalition for an Effective African

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[169] Ibid.
[170] D Shelton 'Case note: Konaté v Burkina Faso' (2015) 109/3 *American Journal of International Law* 634.
[171] Application no. 001/2013, Judgment of 26 May 2017.
[172] Ibid. paras 33 – 36.
[173] For instance, see A Jones 'Form over substance: the African Court's restrictive approach to NGO standing in the SERAP Advisory Opinion (2017) 17/1 *African Human Rights Law Journal* 321 – 329.
[174] *SERAP Advisory Opinion* (n 171 above) para 65.
[175] *Umuhoza* case n 135 above.

Court on Human and Peoples Rights filed observations, supporting the applicant's case. The Court rejected the submission by the applicant and the *amicus curiae* that in the absence of an express provision authorising the withdrawal of the declaration, Rwanda was not entitled to withdraw from the jurisdiction of the African Court.[176]

However, the Court endorsed the alternative arguments urged upon it by the applicant and the *amicus curiae* that should it hold otherwise, it must also attach conditions to Rwanda's withdrawal, namely that before such withdrawal, Rwanda must give notice of its intention to do so. The Court stated that giving notice was critical to guaranteeing juridical security by preventing the sudden suspension of the rights contained in the African Charter which would inevitably have negative implications for individuals and groups, who are the rights holders.[177] According to the Court, this was the more pressing when regard was had to the fact that the Court's Protocol is an 'implementing instrument of the Charter' that gives a guarantee for the enforcement of human and peoples' rights. [178]

The Court pointed out that the abruptness of a withdrawal without prior notice had the potential to undermine the enforcement regime provided for in the Charter.[179] The Court adopted the period of twelve months as the length of notice period required as urged up it by the *amicus curiae*, in line with the practice in the Inter-American system.[180] As regards the legal consequences of the withdrawal of the declaration on pending cases, the Court also adopted the submissions of the applicant and the *amicus curiae* that a unilateral act of the respondent cannot divest the Court of jurisdiction to hear matters which it was already seized with. The Court added that this position comported with the principle of non-retroactivity in terms of which new rules apply only in relation to future situations. The Court therefore held that the respondent's notification of the intention to withdraw bore no legal implications on cases pending before the Court.[181]

[176] Ibid. para 43 – 47, for submissions by the *amicus*.
[177] Ibid. para 62.
[178] Ibid.
[179] Ibid.
[180] Ibid. para 65.
[181] Ibid. para 68.

In *Actions pour la protection des droits de l'Homme (APDH) v The Republic of Côte D'Ivoire* (the *APDH* case),[182] the Court solicited *amicus* briefs from the AU Commission and the African Institute of International Law. In this case, the applicant approached the African Court complaining, among other things, that the electoral law of the respondent state providing for the composition, organisation and duties of the Independent Electoral Commission was not in conformity with international human rights instruments signed and ratified by the respondent state, in particular, the African Charter on Democracy, Elections and Governance (the African Charter on Democracy).[183]

The Court considered it necessary to preliminarily deal with the question as to whether the African Charter on Democracy was a human rights instrument within the meaning of article 3 of the Court's Protocol (establishing the Court's material jurisdiction), before entering the merits of the case.[184] After summarising some portions of filed *amicus* briefs,[185] it expressly stated that it 'takes note of the observations' of the two entities to the effect that the two instruments are human rights instruments within the meaning of the Court's Protocol,[186] and accordingly so held without expressly acknowledging the contribution by *amici curiae*.[187]

When comparing the decision of the Court and the filed briefs, there is ample evidence that the Court relied on the expertise and arguments provided by the *amici curiae*. Critically, the Court used the so called 'subjective rights test' canvassed in detail in the brief filed by the African Institute of International Law[188] and held that in determining whether or not a particular document is a human rights instrument, reference must be made to the purposes of such an instrument.[189] According to the Court, such purposes are proclaimed either via an express affirmation of the 'subjective rights' of individuals or groups of individuals or by imposing obligations on states parties to ensure the enjoyment of the said subjective rights.[190]

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[182] Application no. 001/2014, Judgment of 18 November 2016.
[183] Ibid. para 3.
[184] Ibid paras 3 & 49.
[185] Ibid. paras 51 to 55.
[186] Ibid. para 56.
[187] Ibid. paras 63 – 65.
[188] See pages 5 – 6 of the brief (on file with author).
[189] *APDH* case (n 182 above) para 57.
[190] Ibid. para 57.

Relying on the observations by the African Institute of International Law the Court found that the Democracy Charter guarantees 'some subjective' rights such as one's right to participate in his or her government and therefore quite qualifies as a human rights instrument.[191] The Court also relied on comparative case law offered to it by African Institute of International Law such as *Mathieu-Mohin & Clerfayt v Belgium* as a basis for the above propositions.[192] In tracking how the brief was used by the Court, there is also a striking semblance in the language used in the brief and that used in the decision of the Court in the comparative analysis.[193]

However, it appears that the Court did not rely on the brief by the African Commission, which was not as well-researched and contained no comparative analysis. This approach by the Court seems to support the proposition that courts tend to favour well researched briefs containing international and comparative legal analysis. Indeed, the African Court is frequently prepared to take into account the case law of peer jurisdictions to serve as guidance in human rights dilemmas which it has not previously considered in its own jurisprudence. This approach has assisted it to enhance its capacity to pursue assertive adjudication.

Finally, in the Advisory Opinion *Concerning African Children's Committee*,[194] the Court rejected the unanimous position taken by *amici curiae* that, like the African Commission, the African Children's Committee is competent to refer cases to the Court for a binding decision. It held that because article 5(1) of its Protocol excludes the Committee from the list of organs competent to make such referrals, such an eventuality was not contemplated.[195] This decision has been trenchantly criticised as overly textualist and originalist and that it sacrifices functionality on the altar of formalism.[196]

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[191] Article 12 thereof.
[192] *APDH* case (n 182 above) para 64 and pages 15 – 16 of the brief.
[193] Ibid.
[194] n 137 above.
[195] Ibid. para 100(3)(ii).
[196] F Viljoen 'Regional institutional and remedial arrangements for the judicial enforcement of socio-economic rights in Africa' in DM Chirwa & L Chenwi (eds) *The protection of economic, social and cultural rights in Africa: international, regional and national perspectives* (2016) 258.

It has been contended that both the Commission and the Children's Rights Committee have virtually similar mandates and that there is no basis for them to be treated differently.[197] Further, their decisions are merely recommendatory. Therefore, so the argument proceeds, if their decisions are not complied with, they must be referred to the Court for its binding judgments to ensure enforcement.[198]

5.2.2.4 Overcoming access challenges to the Court

Article 34(6) of the Court's Protocol requires a state to submit a special declaration with the Chairperson of the AU Commission accepting the jurisdiction of the Court before individuals and NGOs (enjoying observer status with the African Commission) can bring claims against it before the Court. Of the twenty-six countries that have signed and ratified the Protocol, only seven countries have deposited the requisite declaration, with Tunisia being the last country to deposit such an instrument on 16 April 2017.[199] Some writers have explained this tardiness in making the declarations on the basis that historically, African societies exhibited a preference for diplomatic and informal means of resolving disputes as opposed to a juridical approach.[200]

Countering this logic, Schulman points out that these social and political modes of dispute resolution no longer accord with the imperative for the advancement of human rights and do not deserve a place in modern societal constructs.[201] According to El-Sheik, the making of such a declaration represents a compromise position to encourage African states to ratify the Protocol without going further to accept the jurisdiction of the court to entertain claims from private entities.[202] Clearly, this argument is unconvincing, as ratifying the Protocol without accepting the authority of the enforcement mechanism makes nonsense of the entire human rights regime.

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[197] Ibid.
[198] Ibid.
[199] Other countries that have deposited the declaration are, Tanzania, Mali, Ghana, Burkina Faso, Malawi and Ivory Coast. Rwanda withdrew its declaration in March 2016.
[200] K Kindiki 'The proposed integration of the African Court of Justice and the African Court on Human and Peoples Rights: legal difficulties and merits' (2007) 15/1 *African Journal of International and Comparative Law* 139.
[201] M Schulman 'The African Court of Justice and Human Rights: a beacon of hope or a dead-end odyssey?' http://www.inkundlajournal.org/inkundla/2013-inkundla-2 (accessed 21 December 2015).
[202] See IAB El-Sheikh, 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights: Introductory note' (1997) 9 *RADIC* 950.

The difficulty in accessing the Court has effectively turned states, the primary violators of human rights, into gate-keepers of this body. As stated in the joint dissenting opinion in *Falana v Nigeria*,[203] the ineluctable consequence of the restricted access to the Court has been that the vast majority of the African population who are in desperate need for redress have been barred from accessing the Court since their countries have refused and/or failed and/or ignored to make the necessary declaration. This difficulty has led Ssenyonjo to conclude that despite this body being called 'an African Court', it is in reality a court for those few states which have deposited the article 34(6) declarations accepting its competence to determine suits brought by individuals and NGOs against them.[204]

Indeed, during the first decade of its existence, the African Court decided a limited number of cases on the merits. This is principally on account of the fact that in the majority of petitions the Court found that it lacked jurisdiction. This was mostly due to the fact that the respondent state had not deposited the required declaration.[205] It is argued that the *amicus* device might be used to overcome access challenges to the Court. Justice Bernard Ngoepe argues that the *amicus curiae* may be conceived and used as a principle of class action. Here, the intervening entity advances not only its own interests but those of a wide section of the AU community in order to somewhat overcome the challenge of access to the African Court.[206]

Put differently, the *amicus* technique could be understood as an alternative to a more formal method of class action.[207] This is because one way in which international dispute settlement regimes protect collective interests is by hearing NGOs as *amici* representing the interests of particular groups in society.[208] Such a communitarianist approach to human rights is especially useful to vindicate the rights of politically

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[203] *Falana v African Union*, Application no. 1/2011, Dissenting Opinion (Akuffo VP, Ngoepe, Thompson JJ) (26 June 2012).
[204] M Ssenyonjo 'Direct access to the African Court on Human and Peoples' Rights by individuals and Non-Governmental Organisations: an overview of the emerging jurisprudence of the African Court 2008-2012' (2013) 2/1 *International Human Rights Law Review* 28.
[205] Viljoen (n 164 above) 67.
[206] Interview with Justice Bernard Ngoepe, former member of the African Court, 27 June 2017.
[207] K Lasson '*Amicus curiae*' in A Levy & PM Sandler (eds) *Amicus briefs in appellate practice for the maryland lawyer - state and federal* (2007) 401.
[208] T Kaime 'Democracy, legitimacy and international climate change law and policy' in T Kaime (ed.) *International climate change law and policy* (2014) 218.

oppressed groups, such as indigenous communities. NGOs are invested with the distinct capability and capacity to suffuse legal interpretation with dynamic ideology that reflects the shared interests of subaltern or excluded and marginalised groups.[209]

In addition, given the fact that the vast majority of the victims of human rights abuses in Africa are not able to access the Court owing to its distance from their communities or other associated challenges such as costs, indigence, illiteracy, fear of reprisals, and many more, *amici curiae* are suitably placed to represent their interests before this body. All these considerations point to the indispensability of utilising the *amicus curiae* as a form of class action in African regional human rights litigation. In this regard, *amici curiae* parallel the *actio popularis* procedure, which is part of the African human rights jurisprudence.

The right to access a remedy or relief under both domestic and international law is a global aspiration and ideal. It constitutes the foundation upon which the entire edifice of the international judicial protection system of human rights rests. It is a normative rule of *jus cogens* and in its absence there is no international judicial human rights protection system to talk about. In the case of *Golder v UK*[210] the European Court stated that: 'one can scarcely conceive of the rule of law without there being a possibility of having access to the courts.'

5.2.2.5 Rate of interventions

Despite the positive attitude of the African Court towards *amici curiae*, the intervention rate of these entities before this body remains conservative but stable.[211] This can arguably be attributed to a number of factors, which include the low number of case dockets as the majority of African states are not subject to the jurisdiction of the Court. In addition, the Court's case-docket range is strikingly repetitious with almost 75% of its cases comprising suits against Tanzania alone. These cases are predominantly

[209] Hodson (n 110 above) 24.
[210] References: 4451/70, [1975] 1 EHRR 524 [1975] 1 EHRR 524, para 34, Judgment OF 12 February 1975. For the same point see *Zimbabwe Human Rights NGO Forum* v *Zimbabwe*, Communication no. 245 (2002); *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda* v *Nigeria*, Communication nos. 140/94, 141/94 145/95(1999); *Philis v Greece* (1991) [12750/87] para. 59; *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589.
[211] Interview with the Registrar, Dr Eno, n 126 above.

about fair trial rights in criminal cases brought by prisoners.[212] Thus, NGOs and other organised interests may feel that the jurisprudence of the Court is trite in this area and that it is therefore unnecessary for them to file *amicus* briefs.[213] It is also correct that repetitious cases are uninteresting and unlikely to attract briefs.

In addition, in some cases the lack of case information in the public domain, as discussed in Chapter 4, denies potential *amici curiae* the opportunity to identify cases of interest to them and to file *amicus* briefs if so minded. As in the case of the African Commission, there is also a general lack of knowledge about the *amicus* procedures of the Court, coupled with the unclear legal basis for *amicus* intervention before this body. The absence of the Court's clear legal basis for *amicus* intervention creates uncertainty and fear on the part of groups that their submissions may be rejected. Some NGOs, especially those based in Africa, face serious resource challenges that constrain their ability to undertake research to assist the Court.[214] This problem also constrains NGOs from hiring more legal officers to assist in litigation before the Court.[215]

Despite these challenges, it is expected that the filing rate of *amicus* briefs before this body will steadily increase as awareness of the relevant procedures as well as the Court's case docket increases.[216] In addition, the Court is intending to invest more resources in training more legal practitioners on the Court's procedures. The Court's Registrar, Dr Eno, believes that these measures will also raise the filing rates of *amicus* briefs, as many legal officers will be aware of the Court's procedures, including those governing *amicus* participation.[217]

5.2.3 African Children's Committee

Thus far, the African Children's Committee has received an *amicus* brief in only one case: *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould*

[212] Interview with Thembile Segoete, Principal Legal Officer, African Court, 17 May 2017.
[213] Ibid.
[214] While desk-top legal research may not be expensive, gathering evidence on the ground may need financial resources.
[215] Interview with Donald Deya, Director, Pan African Lawyers Association, 15 May 2017.
[216] Interview with Dr Eno, 126 above.
[217] Ibid.

Salem and Yarg Ould Salem v The Islamic Republic of Mauritania (*Minority Rights Group International and SOS-Esclaves* case).[218] This case deals with descent-based slavery in Mauritania. The brief was filed by Anti-Slavery International in support of the applicant's case. This brief contains useful background information about the situation of descent-based slavery in the respondent state. The Committee summarised the submissions by the *amicus curiae* without making reference to them at the operational part of its decision.[219] By adopting this approach, it is submitted that the Committee missed the opportunity to conceptualise the role and significance of *amici curiae* in its litigation. This is a shame.

5.2.3.1 Potential contribution of *amicus* briefs

The need for *amicus* participation before the African Committee is all the more pronounced given its budding jurisprudence. In addition, like the African Commission and the African Court, the Committee has very limited human and material resources available to develop its jurisprudence further. According to Hansungule, 'it is a natural, first priority for an international compliance mechanism to admit *amicus curiae*, especially if its jurisprudence is … under-developed.'[220] He points out that concepts such as the doctrine of the best interests of the minor child within the context of the African children rights law are some of the complex and evolving concepts, and suggests that the Committee will need expert knowledge or assistance to deal with and develop the appropriate jurisprudence.[221] It has been argued that the Committee's *amicus* procedure provides:

> An important window for organisations with expertise on child rights or specific thematic issues to present compelling arguments and statements of the law to guide the Committee in its consideration of communications even where such organisations are not a direct party to the communication.[222]

Hansungule points out that experts and working parties as well as organisations such as the United Nations Children's Fund (UNICEF), Save the Children International, the

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[218] Communication no. 007/Com/003/2015.
[219] Ibid. paras 42 & 43.
[220] Interview with Professor Michelo Hansungule, Professor of International human rights law, Centre of Human Rights, University of Pretoria, 17 September 2017.
[221] Ibid.
[222] International Commission of Jurists & Others, *Engaging Africa-based human rights mechanisms: a handbook for NGOs and CSOs* (2018) 83.

Africa-wide Children's Movement, the university centres for children's rights, among others, are some of the entities that possess a wealth of expertise that the African Children's Rights Committee may utilise in its adjudicative task.[223] Indeed, given the resources at their disposal, these entities may assist the Committee with investigative, analytic and comparative legal materials.

Generally, civil society may assist the Committee in building the necessary knowledge base about child protection in Africa, identifying relevant and appropriate practices to address problems of child vulnerabilities and insecurities. It may also help to identify legal and policy lapses that undermine efforts aimed at addressing the underlying causes of vulnerability, particularly in the context of those who suffer most.[224] According to a former member of the Committee, Professor Julia Sloth-Nielsen:

> Experience in children's rights litigation in domestic legal systems highlights the importance of [*amicus*] briefs, including recently in Zimbabwe and South Africa. An *amicus* is able to argue the position for a wider group of children than an individual claimant. An *amicus* is also able to undertake more extensive research, so as to ventilate all the issues arising from a communication, and to approach the matter from (potentially) more than one vantage point. An *amicus* applicant may also be perceived (not always, but certainly in some instance) as being more independent and neutral than an actual litigant. For these reasons, the practice of the [Committee] is likely to be enhanced by the appearance of *amicus curiae* during communications procedures, and as has occurred in the domestic jurisprudence in South Africa.[225]

Along the same lines, the Chairperson of the Committee Professor Benyam Dawit Mezmur, is of the view that the *amicus* opportunity can assist the communication process of the Committee by bringing this body much-needed expertise on children's rights, that is not available to the Committee or its Secretariat.[226] He argues that this would lead the Committee to take decisions on the basis of credible expertise and 'appreciate the difference between fact and fiction.'[227] According to another member of the Committee, Dr Clement Mashamba:

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[223] Ibid.
[224] Interview with Dr Nkatha Murungi, Head of the Children and Law Programme, The African Child Policy Forum, 25 October 2017.
[225] Interview with Professor Julia Sloth-Nielsen, former member, African Children's Committee, 16 August 2017.
[226] Interview with Professor Benyam Dawit Mezmur, Chairperson, the African Children's Rights Committee, 12 December 2017.
[227] Ibid.

> The role of *amici* to the work of the Committee cannot be over-emphasised. Suffice it to say, *amici* are very crucial in the proper guidance and interpretation of various provisions of the [African Children's Charter]. This is because *amici* do provide additional information, experience, understanding and perspective to the Committee's own interpretation. So, *amici* are very important in assisting the Committee in its quasi-judicial function as well as enriching its jurisprudence through child-specific research.[228]

Although members of the African Children's Committee are required to have acknowledged competence in matters of children's rights and welfare, the majority of them have limited knowledge about these concepts. Perhaps this stems in part from the fact that it is not a requirement that members of the African Children's Committee must possess a legal background.[229] This body will therefore do best by availing itself of a wide plenary of opinions by *amicus curiae* on the cases that are brought before it. This will lead to its giving well-researched opinions that will help to build its reputation and attract the respect of the international human rights community.[230] The Chairperson of the African Children's Committee, Professor Mezmur notes that with the increasing number of communications being received by the Committee it is conceivable that this body will be short of time and resources and will therefore greatly benefit from *amicus* submissions in many of the communications it receives.[231]

5.2.3.2 Intervention rate

As pointed out above, the Committee has so far been a beneficiary of *amicus* assistance in only one case: a worrisomely low intervention rate by any standard. A number of factors account for this lack of *amicus* activity. First, the Committee's litigation life is still in its nascent stage. Apart from the *Minority Rights Group International and SOS-Esclaves* case mentioned above, the Committee has rendered only three more decisions.[232] In addition, as in the case of the African Commission, the standing rules of the Committee are wide and flexible. They allow individuals and NGOs to appear as petitioners on behalf of alleged victims. Stressing this point,

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[228] Interview with Dr Clement Mashamba, member, the African Children's Rights Committee, 19 December 2017.
[229] Art 33(1) of the African Children's Charter.
[230] Interview with Hansungule, n 220 above.
[231] Interview with Mezmur, n 226 above.
[232] *The Nubian Minors v Kenya*, Communication 002/2009; *Hansungule and Others (on behalf of children in Northern Uganda) v Uganda, Communication 001/2005*; *Center for Human Rights & Anor* (*on behalf of on behalf of Senegalese Talibés*) *v Senegal* Decision no. 003, Communication no. 001 of 2012.

Mezmur remarks that 'it is important to keep in mind that the communications procedure of the Committee has been characterised as being very generous in terms of standing…'[233]

Analogous to the position at the African Commission, individuals and NGOs are inclined to join the Committee's proceedings as petitioners – a relatively stronger position – as opposed to as the *amicus curiae*. In fact, three of the four cases decided by the Committee were brought by NGOs and the other by an individual on behalf of the children concerned. Finally, as pointed out in the case of the African Commission, the communication procedure of the Committee is confidential. No information about a case brought before the Committee may be furnished to the public until decision stage. This means that potential *amici curiae* are denied vital information to decide whether or not to intervene in a particular case.

5.3 The exclusion of a Commissioner or Judge or Committee member from cases brought against their own country and the unrepresentative nature of the African human rights judiciary

It is important to note that in the African human rights system, a member of the African Commission, the African Court and the African Children's Rights Committee who is a national of a state which is a party to proceedings is not allowed to be part of the panel during the hearing of the case.[234] It appears that this is intended to guarantee the independence of these bodies and remove any semblance of partiality. Moreover, of the fifty-four AU countries, the African Commission, the African Court, and the African Children's Rights Committee are constituted by a total of only eleven members drawn from eleven countries per body at any given time.[235]

This means that these bodies may lack insights into the domestic legal frameworks and practices of the AU countries against whom legal proceedings have been instituted. This is particularly the case given the fact that African countries have

[233] Interview with Mezmur, n 226 above.
[234] Court Protocol, article 22, read with Rule 8(2) & (3); 2010 African Commission's Rules of Procedure, Rule 101(1)(a); Children's Rights Committee, Rule VI; guidelines for the consideration of communications, provided for in article 44 of the African Children's Charter. One may note that this practice differs from the practice of other international tribunals such as the European Court and the ICJ, where the participation of a judge from the state to the dispute is required by law.
[235] For the Commission see, African Charter, article 31; For the Court, see the Court's Protocol Article 11 and Rule 4 of the Court's Rules of Procedure. For the Committee, see article 33(1) of the African Children's Charter.

different legal systems and cultures.[236] In addition, the African human rights system is deeply embedded in Africa's traditions, and ethos and designed to specifically respond to the continent's human rights concerns and conditions.[237] In particular, the OAU created the African Charter to embody the 'values, traditions, and development of Africa.'[238]

It is said that the African system itself was intended to reflect the 'African conception of human rights' and the 'pattern [of] the African philosophy of law [that met] the needs of Africa.'[239] The Preamble of the African Charter provides that 'historical tradition and the values of African civilisation' should 'inspire and characterise … the concept of human and peoples' rights.'[240] Because of the 'uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights',[241] the African Commission has emphasised that the African Charter must be interpreted in a manner that is 'responsive to African circumstances'[242] or has regard to 'the differing legal traditions of Africa.'[243] Africans have a philosophy that is materially and essentially distinct from other philosophies.

The Commission has also stated that it 'reaffirms its commitment to the task of drawing from existing international law while interpreting the Charter in a way that reflects the unique and precious facets of African culture and tradition.'[244] The caveat is that such facets of African culture and values must not be inconsistent with the African Charter.[245] Submissions grounded on the African realities, will ensure that the African supervisory organs, rethink, 'vernacularise' approaches to the development and

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[236] A Stemmet 'A future African Court for Human and Peoples' Rights and domestic human rights norms' (1998) 23 *South African Yearbook of International Law* 233.
[237] T van Boven 'The relations between peoples' rights and human rights in the African Charter' (1986) 7 *Human Rights Law Journal* 186.
[238] LG Franceschi *The African human rights judicial system: streamlining structures and domestication mechanisms viewed from the foreign affairs power perspective* (2014) 107. K Hopkins 'The effect of an African Court on the domestic legal orders of African states' (2002) 2/2 *African Human Rights Law Journal* 241.
[239] Franceschi (n 238 above) 106.
[240] See para 5 of the Preamble of the African Charter.
[241] *SERAC* case (n 121 above) paras 68 – 69.
[242] Ibid.
[243] *Constitutional Rights Project & Anor v Nigeria* (n 29 above) para 26.
[244] *Account of international legislation of Nigeria and the dispositions of the Charter of African Human and Peoples' Rights*, Second Extraordinary Session, Dox II/ES/ACHPR/4, 7.
[245] M Killander 'African human rights law in theory and practice' in S Joseph & A McBeth (ed) *Research handbook on international human rights law* (2010) 391.

definition of human rights norms and principles on the continent. African interpretive mechanisms cannot afford to be oblivious to 'customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine.'[246] They are required to develop 'a truly African conception of human rights and an African human rights jurisprudence.'[247] These mechanisms cannot simply 'copy and paste' the jurisprudencial approaches of the European and the Inter-American systems without adapting them to the African context and expect their case outcomes to be well received by the African constituency without demur.[248] For law to be meaningful and effective, it must reflect society's legal convictions in terms of which justice is conceived. In other words, it must respond to 'the community's general sense of justice,' 'the legal convictions of the community or the '*boni mores* of society'.[249]

Although the African judicial and quasi-judicial bodies first and foremost follow the textual approach to interpretation of the African Charter and related regional documents as required by the Vienna Convention on the Law of Treaties (VCLT),[250] this is counterbalanced by the requirement that they adopt cannons of interpretation that are responsive to African realities.[251] Since a judge-national is disqualified from sitting in judgment against his or her own state, the remaining judges may generally be unfamiliar with the national culture and constitutional traditions of the country being sued – a situation that may lead to serious problems of misjudgment. The nationality of a judge implies the judge's knowledge of the domestic law in issue.

In addition, while human rights are universal in principle, they are national in application. They should therefore be interpreted in context and not in abstraction. The context being a socio-political one, it can only be domestic and this explains why interpretations by international human rights courts and tribunals ought to keep

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[246] A Stemmet 'A future African Court for Human and Peoples' Rights and domestic human rights norms' (1998) 23 *South African Yearbook of International Law* 240.
[247] G Bekker 'The African Court on Human and Peoples' Rights: Safeguarding the interests of African States' (2007) 51/1 *Journal of African Law* 157.
[248] AO Enabulele 'Incompatibility of national law with the African Charter on Human and Peoples' Rights: Does the African Court on Human and Peoples' Rights have the final say?' (2016) 16/1 *African Human Rights Law Journal* 25.
[249] *Precious Kgaje v Oreneile Phindile Mhotsha* CVHFT-000237/17 [unreported] 11.
[250] Viljoen (n 58 above) 324.
[251] Article 31(1) of VCLT. Concluded at Vienna on 23 May 1969. See also F Viljoen 'The African Charter on Human and People's Rights: the *travaux Préparatoires* in the light of subsequent practice (2004) 25 *Human Rights Law Journal* 325.

abreast of domestic developments.[252] In this connection, local NGOs, and other entities such as NHRIs, can play a vital role by exposing domestic contexts to African judicial and quasi-judicial bodies, thus enabling them to accommodate internal dynamics in their adjudicative tasks.

Hearing local *amici curiae* would also make it possible for the tribunals under review to be aware of the potential implications of their decisions, something they might do best when they are aware of the local contexts. This is because a tribunal 'cannot know all of the laws or other materials that may have a bearing on the outcome of a case.'[253] Such 'blocking in' of domestic material would enhance the contextual depth of analysis of a decision. Further, local knowledge might also contribute towards the quality and persuasiveness of the tribunal's decisions, something which might also increase the likelihood that states will comply therewith.[254]

Indeed, for Ayalew Assefa, the Committee would do best by leveraging not only the legal expertise by civil society on comparative materials, but also that of African NGOs with the necessary expertise on African practices, traditions, and cultures,[255] in line with the spirit of the African Children's Charter.[256] Similarly, the Chairperson of the Committee, Mezmur notes that information supplied by *amicus* intervenors would 'help it to understand better legal and administrative processes in a State Party.'[257] Several local NGOs possess specific country knowledge and are therefore placed in good stead to provide the necessary context-specific background information on a particular legal system, practice or situation of a state.[258]

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[252] S Besson 'The *erga omnes* effect of the European Court of Human Rights: what's in a name?' in S Besson (ed.) The European Court of Human Rights after Protocol 14 – First assessment and perspectives (2011) 150.
[253] *Hatton and Others v UK*, Application no. 36022/97 [2003] 37 EHRR 611, Judgment of 8 July 2003. See also N Bratza 'The Relationship between the UK Courts and Strasbourg' (2011) 5 *European Human Rights Law Review* 510 – 511.
[254] LR Glas 'State Third-party interventions before the European Court of Human Rights: the 'what' and 'how' of intervening' (2016) 5/1 *European Journal of Human Rights* 558.
[255] Interview with Mr Ayalew Assefa, Legal Researcher with the African Children's Committee, 19 October 2017.
[256] The Preamble of the African Children's Charter provides that historical African cultural heritage and the values of African civilisation should inspire and characterise the conceptualisation of the rights and welfare of an African child. Article 46 thereof states that 'the Committee shall draw inspiration … from African values and traditions.'
[257] Interview with Mezmur, n 226 above.
[258] N Bürli *Third party interventions before the European Court of Human Rights* (2017) 54.

The involvement of *amici curiae* in the African human rights system might also ensure that states do not withhold crucial evidence to a case. Over the years, international human rights NGOs have unflaggingly demonstrated their industry, deftness and resourcefulness in unearthing pieces of evidence which states and governments had concealed, withheld or simply turned a blind eye.[259] This is because these organisations often monitor country's situations over a prolonged period of time and therefore can expertly inform the tribunal about the territorial, temporal and other dimensions of a state's situation.[260]

Similarly, it is said that groups possessing specific country knowledge are in a position to identify the structural problems within the country's legal system as well to assist in the formulation of solutions.[261] In addition, NGOs that are conversant with a human rights situation in a given country can more easily identify the political and social problems underlying human rights abuses.[262] The input by local groups is particularly necessary in the context of Africa where the regional human rights organs are confronted by the lack of homogeneity among their audience, so that appropriate decisions are made in the light of a complex matrix of historical, social, political and legal needs and expectations.

The lack of a common value system, as is the case with the European Court, means that it will be difficult to use vague notions and concepts to support decisions.[263] Therefore, *amicus* intervenors may assist the Court in clarifying the specific circumstances that gave rise to a specific human rights complaint.[264] Local organisations might not only provide contextual and on-the-ground information, but also present before the tribunal additional and practical perspectives that the claimants, especially the weak and vulnerable, are not always able to present unassisted.[265]

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[259] Mohamed (n 125 above) 212.
[260] Bürli (n 258 above) 60.
[261] Ibid.
[262] Ibid. 53.
[263] Compare, JG Merrills *The development of international law by the European Court of Human Rights* (1993) 31.
[264] P Leach *Taking cases to the European Court of Human Rights* (2011) 50.
[265] S Carrera & B Petkova 'The potential of civil society and human rights organizations through third-party interventions before the European Courts: the EU's area of freedom, security and justice' in M Dawson *et al* (eds) *Judicial activism at the European Court of Justice* (2013) 241.

As argued in Chapter 6, Africans themselves should be active in the continent's human rights litigation and assist in the development of a pan-African human rights jurisprudence.[266] This sentiment is shared by the Director of the Human Rights of Insitute South Africa, Ms Collert Letlojane who maintains that for as long as African-based NGOs remain on the margins, the development and direction of the African regional human rights jurisprudence will continue being dictated by outsiders.[267] In her words: 'we must step out of the shadows and be counted, we know African legal needs than anyone else.'[268] African NGOs must engage in critical discourse, emphasising the need to foster African intellectualism and 'the alternative African world.'[269]

In the *Namibia* case, the ICJ correctly pointed out that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.[270] Along the same lines, the European Court has declared that 'the Convention is a living instrument which … must be interpreted in the light of present-day conditions.'[271] For its part, the Inter-American Court has held that the interpretation adopted for the Inter-American Convention must go hand in hand with evolving times and current living conditions.'[272] Elsewhere, the Inter-American Court emphasised the notion of 'evolving American Law.'[273]

The interpretive organs of the African human rights system have not commented on the possibilities for interpretation of the African Charter. However, writing extra-curially, a former judge of the African Court, Justice Ouguergouz, has described the African

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[266] A Ankumah *African Commission of Human Rights* (1996) 34.
[267] Interview with Collert Letlojane, Human Rights Institute of South Africa, 18 September 2017.
[268] Ibid.
[269] IG Shivji *Silences in NGO discourse: the role and future of NGOs in Africa* (2007) 44.
[270] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council* Resolution 276 (1970), [1971] ICJ Reports 16, para 53. See also ST Helmerson 'Evolutive treaty interpretation: legality, semantics and distinctions' (2013) 6/1 *European Journal of Legal studies* 161; P Mahoney & R Kondak 'Common ground: a starting point or a destination for comparative law analysis by the European Court of Human Rights' in M Andenas & D Fairgrieve *Courts and Comparative Law* (2015)122; A Clapham 'The role of the individual in International Law' (2010) 21/1 *European Journal of International Law* 26.
[271] *Tyrer v UK* 5856/72, (1978) 2 EHRR 1, [1978] ECHR 2, Judgment of 25 April 1978.
[272] *Mapiripán Massacre v Colombia* Preliminary objections, IACHR Series C no. 122, [2005] IACHR 3, para 106, Judgment of 7 March 2007.
[273] See *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework* of article 64 of the American Convention, Advisory Opinion, Advisory Opinion OC-10/89, IACtHR, (Ser A) no. 10 [1989], paras 37 – 38, Opinion of 14 July 1989.

Charter as 'a viable juridical instrument full of interpretational possibilities.'[274] Using dynamic interpretive approaches, the African Commission has practically re-written its provisions. [275] An interpretive technique that is reflexive of societal realities helps prevent a rigid formalism and ossification of international human rights instruments.

5.4 Interim conclusion

This chapter makes a legal and empirical survey of the participation of *amici curiae* before the interpretive organs of the African human rights system. It explores their potential and actual role in the adjudicative tasks of these bodies. There is a broad consensus among members of these bodies that *amici curiae* have the potential to assist them to settle legal controversies brought before them and also to develop African particularist normative standards. In line with this conviction, these bodies have opened their portals to individuals, NGOs and groups, acting as *amici curiae*, to provide them with theories, ideas, methods and perspectives.

In addition, like many other African regional institutions, the African human rights system is hamstrung by resource constraints, which undermine its effectiveness. The participation of well-resourced rights groups would ensure that their resources are placed at the disposal of African regional judicial and quasi judicial bodies, especially in undertaking costly comparative research. The participation of individuals, NGOs and groups as *amici curiae* is arguably all the more necessary in the African context, on account of the institutional weakness and shortage of suitably qualified human rights lawyers on the continent.[276] As regards impact, the Chapter reveals that the African Commission and the African Court have already begun relying on *amicus* submissions in their adjudicative tasks.

However, the contribution of *amici curiae* in the decisions of these bodies can be said to be mixed. This is because while in some cases, these interpretive bodies have relied on *amicus* submissions to ground their conclusions, in other cases arguments by intervenors were rejected, or simply ignored without explanation. Further, it must be

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[274] F Ouguergouz *The African Charter of Human and People's Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (1993) 388.
[275] K O Kufuor *The African Human Rights System: Origin and Evolution* (2010) 37. See also Viljoen (n 58 above) 323.
[276] Viljoen & Abebe (117 above) 40.

recalled that a Commissioner, Judge and Committee member who is a national of a state that is party to a dispute is not permitted to sit in judgment over that particular dispute. Thus, permitting *amici curiae* to file their statements is a means of proffering expertise about the domestic laws, policies and practices to the tribunal which may have otherwise been provided by a disqualified member.[277]

The local interest groups and experts are in a better position to obtain and assess local knowledge and reflect all the nuances that are hidden behind observable practices, which regional tribunals may miss or misjudge altogether because they have no immediate, direct and continuous knowledge of the factual realities in the particular country. It must be noted that international human rights texts are attended by the 'possibilities of geographical peculiarities in the enforcement of human rights obligations.'[278] The cheerless reality is that there is no guarantee of the availability of an expert in the national law of a particular state among the officers at the secretariat or registry of any of the African human rights tribunals or bodies.

[277] Ibid.
[278] P Contreras 'National discretion and international deference in the restriction of human rights: a comparison between the jurisprudence of the European and the Inter-American Court of Human Rights' (2012) 11/1 *Northwestern Journal of International Human Rights* 28.

CHAPTER 6

THE LEGITIMATORY ROLE OF *AMICI CURIAE*

6.1 Introduction

This chapter examines the extent to which *amici curiae* may assist in ameliorating the democratic legitimacy deficit in the African human rights system. Although it focuses on African regional human rights courts and tribunals, its theme has implications for all regional human rights courts as well as other judicial mechanisms in other areas of international law, whose continuing accretion of power and public authority has generated similar legitimacy concerns. In particular, the increasingly authoritative decision-making powers over contestable human rights norms and standards by the mechanisms under analysis present significant anti-democratic implications for local polities.[1]

An authoritative and assertive supervisory function of the international human rights judiciary has resulted in what Donoho refers to as 'international democratic deficit.'[2] This theoretical claim holds that international governance is inherently undemocratic in that it excessively dilutes or completely eliminates the voices of individuals and groups in its processes.[3] As developed below, these negative implications for local governance raise questions about the democratic legitimacy of the African judicial and quasi-judicial bodies. The concerns that this chapter raises largely parallel the well-trodden discourse over the democratic legitimacy of judicial review by local constitutional courts.

However, they also present problems peculiar to the international context that are specifically relevant to the international judicial and quasi-judicial settlement of human rights claims. In terms of contemporary political theory, whenever the lives of people are affected by the exercise of public authority – be it executive, legislative, or judicial – such authority must be legitimated, with the broadly accepted form of legitimation being democratic legitimation.[4] Many critiques of global multilateralism rely on

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[1] DL Donoho 'Democratic legitimacy in human rights: the future of international decision-making' (2003) 21/1 *Wisconsin International Law Journal* 2.
[2] Ibid 15.
[3] Ibid 17.
[4] A von Staden 'The democratic legitimacy of judicial review beyond the state: normative subsidiarity and judicial standards of review' (2012) 10/4 *International Journal of Constitutional Law* 1024.

democracy as the international 'magical elixir' for institutional legitimacy. This is because to attach the label 'democratic' to a particular process is to legitimate it, and conversely to attach the label 'undemocratic' to it is to put its legitimacy into question.[5]

It is no over-statement to suggest that democracy has now become the touchstone of legitimacy in contemporary global politics.[6] The core tenets of legitimacy in democratic theory include participation, accountability, deliberation and transparency – all of which are conceptually inter-linked and mutually supportive.[7] The democratic theory postulates that increased civil society involvement ameliorates the democratic deficit and enhances the acceptance and legitimacy of an international dispute settlement system.[8] In this connection, the chapter challenges the adequacy of the so-called state-based consent theory. This is a conventional and still widely pervasive view that holds that decisions of international courts and tribunals derive their legitimacy from the consent of the parties to the claim: both from the consensual basis of the applicable law as well as from the consent-based jurisdiction.[9]

There is no standard and authoritative definition for the concept of legitimacy.[10] It has been used in the context of the international judiciary to mean different things to different writers.[11] By legitimacy in this context, is meant the justification for believing that an international court or tribunal has 'the right to rule'.[12] This concept is based on

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[5] D Bodansky 'The legitimacy of international governance: a coming challenge for International Environmental Law? (1999) 93/3 *American Journal of International Law* 613.
[6] Ibid. 599. D Held *Democracy and the global order: from the modern state to cosmopolitan governance* (1995) 1.
[7] S Bernstein 'Legitimacy in global environmental governance' (2004-5) 1/1-2 *Journal of International Law & International Relations* 147.
[8] B Chouddhry 'Recapturing public power: is investment arbitration's engagement of the public interest contributing to the democratic deficit?' (2008) 41/3 *Vanderbilt Journal of Transnational Law* 808.
[9] A von Bogdandy & I Venzke 'On the democratic legitimation of international judicial law-making' (2013) 12/5 *German Law Journal* 1341.
[10] PW Almeida 'The case of MERCOSUR' in R Howse *et al* (eds) *The legitimacy of international trade courts and tribunals* (2018) 228. See also AK Bjrklund 'The legitimacy of the international Centre for Settlement for Investments Disputes' in CH Cohen *et al The legitimacy of international courts* (2018) 235.
[11] A Føllesdal 'The legitimacy deficits of the human rights judiciary: elements and implications of a normative theory' (2013) 14/2 *Theoretical Inquiries in Law* 345.
[12] Bodansky (n 5 above) 601; D Bodansky 'The concept of legitimacy in international law' in R Wolfrum & V Röben (eds), Legitimacy in International Law (2-008) 313; D Bodansky 'Legitimacy in International Law and International Relations' in JL Dunoff & MA Pollack (eds.) *Interdisciplinary perspectives on international law and international relations: the state of the art* (2013) 324; A Buchanan 'The legitimacy of international law' in S Besson & J Tasioulas (eds) *The philosophy of international law* (2010) 79; A Føllesdal 'Legitimacy deficits beyond the state: diagnoses and cures' in A Hurrelmann, *et al* (eds.)

the understanding that, 'particular claims to authority deserve respect or obedience for reasons not restricted to self-interest and traces to Max Weber.'[13] Similarly, the literature of sociology postulates that an international tribunal must be considered by states and the public, including potential litigants and other stakeholders as legitimate.[14]

Legitimate international courts and tribunals are those 'whose authority is perceived as justified.'[15] Such an international court or tribunal must possess some 'quality that leads people (or states) to accept [its] authority … because of a general sense that the authority is justified.'[16] Since judicial tribunals typically possess neither the power of the 'purse nor the sword, … moral authority is essential to judicial effectiveness.'[17] This sociological manifestation of legitimacy is often conferred on a body that 'the relevant public regards … as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions, or more hope for personal reward.'[18]

Such voluntary support or, what may be called audience-derived legitimacy, is important for the judiciary, as it cannot derive its legitimacy from popular election.[19] Rather, the authority of the courts derives from the confidence that the citizenry has in them.[20] If a court is considered legitimate, its decision will enjoy a high level of acceptance from the public as a matter of empirical fact, even if the public may

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Legitimacy in an age of global politics (2007) 211-228; J Pauwelyn 'Who decides matters' in HG Cohen *et al Legitimacy and international courts* (2018) 218.

[13] Bodansky (n 5 above) 602. For an outline of the position, see MR Madsen 'Sociological approaches to international courts' in K Alter *et al* (eds) *Handbook of international adjudication* (2014) 388 – 412.

[14] Y Shany *Assessing the effectiveness of international courts* (2012) 138; O Bassok 'The Supreme Court's new source of legitimacy' (2013) 16/1 *Journal of Constitutional Law* 155.

[15] N Grossman 'Legitimacy and international adjudicative bodies' (2009) 41/1 *George Washington International Law Review* 110.

[16] Ibid. See also GA Caldeira *et al* 'On the legitimacy of national high courts' (1998) 92/2 *American Political Science Review* 343; JL Gibson et al 'Defenders of democracy? legitimacy, popular acceptance and the South African Constitutional Court' (2003) 65/1 *Journal of Politics* 3. See also I Hurd *After anarchy: legitimacy and power in the United Nations Security* Council (2007) 3.

[17] J Gibson & G Caldeira 'The legitimacy of transnational legal institutions: compliance, support, and the European Court of Justice' (1995) 39/2 *American Journal of Political Science* 460.

[18] R Fallon 'Legitimacy and the constitution' (2004/2005) 118/6 *Harvard Law Review* 1795. See also MC Suchman 'Managing legitimacy: strategic and institutional approaches' (1995) 20/3 *Academy of Management Review* 574.

[19] GA Caldeira & JL Gibson 'The etiology of public support for the Supreme Court' (1992) 36/3 *American Journal of Political science* 635.

[20] S Mancini 'The crucifix rage: supranational constitutionalism bumps against the counter-majoritarian difficulty' (2010) 6/1 *European Constitutional Law Review* 26 – 27.

entertain some doubts over the correctness or otherwise of such a decision.[21] Further, the more an institution is widely accepted as legitimate, the more effective and stable it is likely to become.[22]

6.2 Judicial review from domestic and international perspectives

Because the concept of judicial review has domestic origins, it is eminently apposite to briefly recount the main arguments both for and against the judicial review procedure at the domestic level as a background for the subsequent analysis relating to judicial review at the international level. Although judicial review is a feature of domestic constitutionalism, the African Charter has developed into a *de facto* constitution for the AU, with countries such as Nigeria having incorporated it into their domestic law.[23] This, therefore, makes an analogy between domestic judicial review and international judicial review by African judicial and quasi-judicial bodies tenable. This is a necessary link without which the transposition of the judicial review principle from municipal law to international law cannot be effectuated.[24]

6.2.1 Democratic theory and domestic judicial review

For several years, scholars around the world, especially in the US, have grappled with the question of the democratic credentials of the procedure of judicial review. They challenge the power of courts to sit in judgment, by way of review, on decisions of elected institutions such as parliaments.[25] The tension between democracy and constitutionalism has been part of the American constitutional theory since the beginning of the twentieth century.[26] Thomas Jefferson conceived judicial review to be

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[21] S Dothan 'How international courts enhance their legitimacy' (2013) 14/2 *Theoretical Inquiries in Law* 456; E Voeten 'Public opinion and the legitimacy of international courts' (2013) 14/2 *Theoretical Inquiries in Law* 415; S Wheately 'On the legitimate authority of international human rights bodies' in A Føllesdal *et al* (eds) *The legitimacy of international human rights regimes legal, political and philosophical perspectives* (2013) 94.

[22] M Weber *Economy and society* (1968) 31, G Roth & C Wittich (eds). See also CL Black *The people and the court: judicial review in a democracy* (1960) 52.

[23] For the place of the African Charter in the Nigerian legal order, see EO Ekhator 'The impact of the African Charter on Human and Peoples' Rights on domestic law: a case study of Nigeria' (2015) 41/2 *Commonwealth Law Bulletin* 256 – 257.

[24] E de Wet 'Judicial review as an emerging general principle of law and its implications for the International Court of Justice' (2000) 47/2 *Netherlands International Law Review* 185.

[25] S Freeman 'Constitutional democracy and the legitimacy of judicial review' (1990/91) 9/4 *Law & Philosophy* 327.

[26] R Post 'Democracy, popular sovereignty, and judicial review' (1998) 86/3 *California Law Review* 429.

a 'very dangerous doctrine indeed, one which places us under the despotism of an oligarchy.'[27] According to this politician and thinker:

> The people themselves are the only safe depositories of government, and that connotes absolute acquiescence in the decisions of the majority – the vital principle of republics from which there is no appeal but force.[28]

Opponents of judicial review argue that the theoretical tenets that ground the rule of law are undemocratic in that they overrule and set aside the will of the polity and replace it with the will of the judiciary.[29] One of the most influential American constitutional theorist, Bickel, summed up the conceptual controversies surrounding this debate in his popular phrase 'the counter-majoritarian difficulty.'[30] He explained that 'judicial review is a counter-majoritarian force in our system' and that 'when the Supreme Court declares unconstitutional a legislative act … it thwarts the will of representatives of the actual people of the here and now'.[31] Bickel, therefore, considered judicial review to be 'a deviant institution in the American democracy.'[32] He added:

> Nothing in the further complexities and perplexities of the system, which modern political science has explored with admirable and ingenious industry, and some of which it has tended to multiply with a fertility that passes the mere zeal of the discoverer—nothing in these complexities can alter the essential reality that judicial review is a deviant institution in the American democracy[33]

In essence, although judicial review is important in policing constitutional boundaries, it raises grave democratic concerns because it allows unelected judges to overrule majoritarian decisions.[34] As one writer found it important to stress, judicial review 'is in conflict with the fundamental principle of democracy-majority rule under conditions of political freedom.'[35] Opponents of judicial review argue that giving the courts the power to be the final arbiters in public disputes despoils the democratic majority of their

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[27] Quoted in Freeman (n 25 above) 328.
[28] Ibid.
[29] D Feldman 'Democracy, the rule of law and judicial review' (1990) 19/1 *Federal Law Review* 1.
[30] A M Bickel *The least dangerous branch* (1986) 16-17.
[31] Ibid.
[32] Ibid.18.
[33] Ibid. 17 – 18.
[34] R Bellamy *Political constitutionalism: a republican defence of the constitutionality of democracy* (2007) 260.
[35] JH Choper 'The Supreme Court and the political branches: democratic theory and practice' (1974) 122/4 *University of Pennsylvania Law Review* 815.

legitimate right to govern, through its elected bodies.[36] They contend that the will of the majority ought to reign supreme in the formulation of law and policy.[37]

The concern by this community of theorists is that in liberal political theory, legislative supremacy is a key feature of popular self-government, and that democratic principles and ethos are bound to exist in an uneasy relationship with the position that holds that 'elected legislatures are to operate only on the sufferance of unelected judges.'[38] By according the privilege of majority voting to a coterie of unelected, unrepresentative and unaccountable judges, judicial review 'disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.'[39]

According to Hart, English legal theorists find the counter majoritarian nature of judicial review to be an 'extraordinary judicial phenomenon,' in that it is 'particularly hard to justify in a democracy.'[40] Similarly, Hook as for Hart, asserts that: 'those who defend the theory of judicial supremacy cannot easily square their position with any reasonable interpretation of the theory of democracy.'[41] The counter-majoritarian theorists argue that the role of courts of law has been considered as basically subordinate; the courts do not engage in the business of making social and political policy choices, but must merely give effect to such policy choices as determined by others.[42]

Legislative bodies are said to be better suited to making political choices and realising the objectives of the political equality of all members in a democratic polity than courts are.[43] Critics of judicial review have also contended that this procedure tends to devalue the legislative function and undermine the vitality of deliberative

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[36] J Waldron 'The Core of the Case against judicial review' (2005-2006) 115/6 *Yale Law Journal* 1346.
[37] C Scott & P Macklem 'Constitutional ropes of sand or justiciable guarantees? social rights in a new South African Constitution' (1992) 141/1 *University of Pennsylvania Law Review* 17.
[38] Waldron (n 36 above) 1349. See also PJ Monahan 'Judicial review and democracy: a theory of judicial review' (1987) 21/1 *University of British Columbia Law Review* 287.
[39] Waldron, Ibid. 1353. See also N Almendares & PL Bihan 'Increasing leverage: judicial review as a democracy-enhancing institution' 2015 10/3 *Quarterly Journal of Political Science* 357.
[40] HLA Hart 'American jurisprudence through English eyes' Essays in jurisprudence and philosophy (1983) 125. For perspectives from an African writer, see T Roux *The politico-legal dynamics of judicial review: a comparative analysis* (2018).
[41] S Hook *The paradoxes of freedom* (1962) 95.
[42] Monahan (n 38 above) 288.
[43] Ibid.

democracy.[44]Judicial review has been metaphorically presented as an undemocratic shoot on an otherwise harmless and respectable tree, which should be cut off altogether, or at least kept pruned and inconspicuous.[45] It has been said that whatever the possible usefulness of this practice, it is still anything but democratic.[46] To this end, some writers have concluded that judicial review ought to be abrogated – either by an act of judicial voluntary surrender of the power, or through legislative means.[47] For others, the application of judicial review must be limited to the most incontestable and compelling case of constitutional delinquency.[48]

On the other hand, defenders of judicial review support this procedure on the basis of the constitutional supremacy theory. They contend that it is universally accepted that the constitution is the basic law in a legal system and that its supremacy can be guaranteed only through the procedure of the judicial review of legislation.[49] According to this thinking, judicial review is the obvious safeguard for fundamental rights: 'the interventionist legislature and executive are the last institutions to be entrusted with this duty of protection.'[50]

One of the notable modern proponents of judicial review, Johanningmeier, argues that judicial review has always been an accepted answer by the American people to the perceived 'majoritarian tyranny' of representative bodies.[51] It has also been contended that judges are uniquely placed to:

> Guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which … occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.[52]

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[44] C Sunstein 'The Supreme Court 1995 term: foreword: leaving things undecided' (1996) 110 *Harvard Law Review* 33-37.
[45] EV Rostow 'The democratic character of judicial review' (1952) 66/2 *Harvard Law Review* 193.
[46] C McClesky 'Judicial review in a democracy: a dissenting opinion' (1966) 3 *Houston Law Review* 359.
[47] M Cohen *The faith of a liberal* (1946) 178.
[48] JB Thayer 'The origin and scope of the American doctrine of constitutional law' (1893) 7/3 *Harvard Law Review* 143-44.
[49] M Troper 'Judicial Review and International Law' (2003) 4 *San Diego International Law Journal* 39.
[50] LWH Ackermann 'Constitutional Protection of Human Rights: judicial review' (1989) 21/1 *Columbia Human Rights Law Review* 66.
[51] CA Johanningmeier 'Law & Politics: the case against judicial review of direct democracy' (2007) 82/4 *Indiana Law Journal* 1126.
[52] Quoted in BH Siegan *Property rights: from magna Carter to the fourteenth amendment* (2001) 95.

In fact, it has been argued that a key function of a judiciary in a democratic setup is the protection of the rights of the minority.[53] Without a judicial oversight, the rights of those who are politically weak are likely to be trampled underfoot without opportunity for recourse. Judicial review therefore ensures that everybody counts.[54] Where judicial review is deployed to safeguard the basic legal values and fundamental human rights in a democracy, it almost invariably takes place in the context of a written constitution containing a bill of rights.[55] The very aim of a bill of rights is to remove certain subjects, such as fundamental freedoms and liberties, from the realm of political controversy.[56] As remarked by Jackson J in *West Virginia State Board of Education v Barnette and Others*:[57]

> The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities ... and to establish them as legal principles to be applied by the courts. One's right to life ... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[58]

It has also been said that among the three arms of government, the judiciary is relatively insulated from short-term majoritarian pressures and accordingly it is less likely to uncritically accept the majority's perspectives about the rights of other individuals.[59] By placing emphasis on enduring societal values like the rights of minorities, judicial review is seen as a 'sensible way to promote non-majoritarian representative democracy.'[60] Moreover, given the fact that courts of law are situated outside the competitive political arena, they provide a conducive environment where, 'the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply issues of political power.'[61]

In the end, although the raging debates about the democratic credentials of judicial review are based on the domestic legal context, the underlying doctrinal and

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[53] AM Burley 'Democracy and judicial review in the European Community' (1992) 1/1 *University of Chicago Legal Forum* 86.
[54] I Shapiro *State of democratic theory* (2003) 235 – 65.
[55] Ackermann (n 50 above) 60.
[56] T Christiano 'Waldron on law and disagreement' (2000) 19/4 *Law and Philosophy* 537.
[57] 319 US (1943) 624.
[58] Ibid. 638.
[59] E Bernick 'Fallible but final: why Justice Scalia is wrong about the Supreme Court's authority' (2015). Available at: http://www.huffingtonpost.com/evan-bernick/why-justice-scalia-is-wrong-about-the-supreme-courts-authority_b_8591852.html (accessed 21 November 2016).
[60] C Eisgruber *Constitutional self-government* (2001) 210.
[61] R Dworkin *The forum of principle* (1981) 56/2-3 *New York University Law Review* 517.

theoretical tenets of these debates can be extended beyond the domestic province. After all, the national acts that international courts and tribunals assess for compliance with the normative standards contained in international treaties emanate, predominantly from laws and policies put in place by domestic authorities.[62] In addition, it must be borne in mind that international courts and tribunals, just like domestic constitutional courts, exercise a constitutional function. Indeed, since the 1990s, regional human rights courts have been likened to domestic constitutional courts, distinguishing them from classical courts that operate within the realm of international law such as the ICJ.[63]

6.2.2 Democratic theory and international judicial review

With the prevalence of authoritarian rulers in Africa who demonstrate little or no regard for the rule of law, presiding over fragile democratic systems, the international judicial review of acts of states for want of compliance with international law is particularly important. This review mechanism provides an external accountability check and a critical lifeline in the event that domestic courts lack adequate independence or the courage to curb governments' excesses and protect human rights.[64] The protection of human rights is often seen as a legal obligation of a superior order, such that the enforcement of international human rights instruments may be seen as broadly analogous to the constitutional review of state acts.[65]

The extensive review powers of international courts and tribunals in sensitive areas, such as human rights, generates legitimacy concerns, as such powers may be seen as being inconsistent with conventional principles of public international law (such as state sovereignty) as well as important state interests (like avoiding interference in reserved domains of states).[66] Generally, states are unwilling to cede their sovereignty

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[62] Von Staden (n 4 above) 1030.
[63] TG Daly *The alchemists: questioning our faith in courts as democracy-builders* (2017) 160.
[64] KA Alter 'National perspectives on international constitutional review: diverging optics' in E Delaney & R Dixon (eds) *Comparative judicial review* (2018), forthcoming.
[65] KJ Alter 'The multiple roles of international courts and tribunals: enforcement, dispute settlement and constitutional and administrative review' in JL Dunoff & MA Pollack (eds) *Interdisciplinary perspective on international law and international relations: the state of the art* (2013) 353.
[66] Shany (n 14 above) 143; B Chigara *Legitimacy deficit in custom: a deconstructionist critique* (2017) 75; E Kwakwa 'International conflicts in Africa: is there a right of humanitarian action?' (1995) *African Yearbook of International Law* 9; R Bellamy 'The democratic legitimacy of international human rights conventions: political constitutionalism and the European Convention on Human Rights' *(*2015) 25/4 *European Journal of International Law* 1020; J Mayerfeld 'The democratic legitimacy of international human rights law' (2009) 19/1 *Indiana International and Comparative Law Review* 49.

to supranational bodies.[67] This argument holds weight particularly in the African context where states are still inflexibly wedded to the outdated non-relative Westphalian concept of sovereignty.

The fear is that in the course of their adjudicative exercise, human rights courts 'may interfere significantly with the activities of national legislative, executive, and judicial organs.'[68] Like domestic courts, international human rights courts and tribunals have the power to give condemnatory verdicts which are usually in the form of directives. Such a directive may require a government to change its laws and policies; establish agencies or bodies to monitor compliance with human rights norms; correct subsisting human rights violations and hold human rights violators accountable for their mischief.[69]

Yet, some criticise the international human rights judiciary for not being intrusive enough or failing to set stronger international standards of best practice for democratic governance to flourish.[70] Be that as it may, the growing role of international courts and tribunals in reviewing state acts has fundamentally altered what was once considered as a predominantly academic jurisprudential debate about whether or not international law should be seen as domestically binding into a situation where international courts and tribunals declare violations of international law and prescribe a remedy with domestic effects.[71]

Indeed, the African Commission has noted that its creation signifies 'a limitation on sovereign national authority (at least on human rights related matters) [...]' and that its review powers are important for its commitment towards 'ushering in a new era of

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[67] RJV Cole 'The African Court on Human and Peoples' Rights: will political stereotypes form an obstacle to the enforcement of its decisions?' (2010) 43/1 *Comparative and International Law Journal of Southern Africa* 39; KO Kufour 'Securing compliance with the judgments of the ECOWAS Court of Justice' (1996) 8/2 *African Journal of International and Comparative Law* 7.

[68] G Ulfstein 'The International Judiciary' in J Klabbers *et al* (eds) *The Constitutionalization of International Law* (2009) 127; A Føllesdal 'Subsidiarity and international human-rights courts: respecting self-governance and protecting human rights—or neither?' (2016) 79/2 *Law and Contemporary Problems* 147; A Føllesdal 'The legitimacy of international human rights review: the case of the European Court of Human Rights' (2009) 40/4 *Journal of Social Philosophy* 595.

[69] JK Schaffer *et al* 'International human rights and the challenge of legitimacy' in A Føllesdal *et al* (eds) *The legitimacy of international human rights regimes: Legal, political and philosophical perspectives* (2013) 4.

[70] V Abramovich 'From massive human rights problems to structural patterns: new approaches and classic tensions in the Inter-American System' (2009) 6/11 *Sur: International Journal of Human Rights* 6.

[71] JK Schaffer 'The boundaries of transnational democracy: alternatives to the all-affected principle' (2012) 38/2 *Review of International Studies* 321– 42.

recognition of individual's rights.'[72] Over the years, this body has developed a practice of issuing 'extensive and relatively intrusive' remedial measures.[73] Although its decisions are not binding, compliance is expected, and therefore, its decisions are capable of limiting governmental action and discretion. They are imbued with high legal, moral and political persuasive force and are akin to those of UN treaty bodies such as the Human Rights Committee.[74] The African Commission has also pointed out that although its 'findings and concluding observations … are not formally binding, states take serious note of them.'[75] In fact, the African Commission considers that its interim measures of protection are binding between the parties to the dispute.[76]

Even in the case of non-binding opinions, an exercise of judicial review power by a tribunal inescapably triggers democratic legitimacy concerns.[77] A respondent state is expected to comply with decisions of judicial and quasi-judicial bodies alike by virtue of being a signatory and having accepted obligations arising from the treaty in question.[78] Although the decisions of judicial bodies are often considered as carrying more normative weight because of their binding nature, the findings of quasi-judicial bodies also arguably carry the same duty of compliance for the state party against which it is directed in as much as they are merely declarative of states parties' obligations under the treaty concerned.[79]

In addition, mechanisms such as the UN Human Rights Committee have increasingly advanced strenuous arguments that decisions of quasi-judicial bodies are binding upon states since such decisions constitute authoritative interpretations of the relevant

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[72] African Commission – OAU, Information Sheet no. 2 Quoted in LG Franceschi *The African human rights judicial system: streamlining structures and domestication mechanisms viewed from the foreign affairs power perspectiv*e (2014) 142-143.
[73] F Viljoen 'From a cat into a lion? an overview of the progress and challenges of the African human right system at the African Commission's 25-year mark' (2013) 17 *Law, Democracy & Development* 302.
[74] GJ Naldi 'The African Union and the regional human rights system' in M Evans & R Murray *The African Charter on Human and Peoples' Rights: the system in practice* (2008) 36.
[75] See African Commission's Report, 'Impact of the African Charter on domestic human rights in Africa' http://www.achpr.org/instruments/achpr/impact-on-domestic-human-rights/ (accessed 22 November 2016).
[75] Ibid.
[76] F Viljoen 'A human rights court for Africa, and Africans' (2004) 30/1 *Brooklyn Journal of International Law* 20.
[77] WM Reisman 'The constitutional crisis in the United Nations' (1993) 87/1 *American Journal of International Law* 92.
[78] L Oette 'Bridging the enforcement gap: compliance of states parties with decisions of human rights treaty bodies' (2010) 16/2 *Interights Bulletin* 51.
[79] Ibid.

treaties.[80] It is in this regard, that this study rejects the argument by Bruch that because human rights commissions and compliance committees are not courts of law, their obligations for public participation, and therefore their levels of transparency and accountability must be less exacting than those of courts.[81]

Unlike in the case of African Commission, the binding effect of decisions of the African Court is beyond question. This Court is known for exercising extensive review powers than any of its counterparts in Europe or the Americas. Courts in the latter systems merely flag national laws found to be incompartible with international law. They generally lack the power to strike down such impugned laws in the same manner as domestic constitutional courts are empowered to do.[82] The African Court has started 'issuing strong merits judgments'[83] and operates as a 'constitutional court for Africa.'[84] In *Reverend Christopher Mtikila v the United Republic of Tanzania*,[85] the African Court found certain provisions of the Tanzanian Constitution that disallowed independent candidacy for political office to be incompartible with the African Charter and other international human rights instruments.[86]

In *Peter Joseph Chacha v The United Republic of Tanzania,*[87] the African Court exercised its review powers like a national constitutional court. It directed that the respondent state should take constitutional, legislative, administrative 'and all other necessary measures within a reasonable time to remedy the violations found by the Court and to inform the Court of the measures taken.'[88] Similarly, in *Lohé Issa Konaté v Burkina Faso* (the *Konaté* case),[89] the Court went even further, specifically ordering the respondent state to amend its defamation laws by eliminating custodial sentences

[80] *Bradslaw v Barbados*, Case no. 489/1992, Supp no. 40, Annex X, (1994) UN Doc A/49/40, 305, Opinion of 19 July 1994.
[81] C Bruch *The new "public": the globalization of public participation* (2002) 257.
[82] ST Ebobrah 'Reinforcing the identity of the African Children' s Rights Committee: a case for limiting the lust for judicial powers in quasi-judicial Human rights mechanisms' (2015) 2/1 The *Transnational Human Rights Review* 22.
[83] TG Daly 'The alchemists: Courts as democracy-builders in contemporary thought' (2017) 6/1 *Global Constitutionalism* 103.
[84] A Abebe 'Taming regressive constitutional amendments: the African Court as a continental (super) constitutional court' (2018) *International Journal of Constitutional Law* 1, forthcoming.
[85] Applications no. 009/2011 & 011/2011, Judgment of 14 June 2013.
[86] Ibid para 126(1)(2) & (3).
[87] Application Number 003/2012, Judgment of 28 March 2014.
[88] Ibid. para 82. See also *Tanganyika Law Society & Another v United Republic of Tanzania*, Application no. 011/2011, para 32, Judgment of 14 June 2014.
[89] Application no. 04/2013, Judgment of 5 December 2014.

for defamatory acts, and ensuring that other sanctions for defamation meet the test of necessity and proportionality.[90]

Likewise, in *Zongo v Burkina Faso*,[91] the African Court directed Burkina Faso to undertake investigations with a view to identifying, prosecuting and punishing the killers of journalist, Norbert Zongo and his companions.[92] Like their regional counterparts, African human rights judicial and quasi-judicial bodies not only give decisions which may require a change in the law, policy or practice of a state but may also couple that with an order to pay compensation.[93] Compensatory orders have enormous implications on public funds and consequently necessarily constitute public interest.[94] The unavoidable potential impact by such orders on the states' budgets may serve to justify individuals' or groups' interest in making their propositions known to the tribunal and the parties.[95]

The argument being sustained is that the African human rights judiciary, particularly the African Court employ methods and techniques similar to those employed by domestic constitutional courts. Similarly, the Inter-American Court has been described as 'a supranational human rights constitutional court.'[96] Likening the European Court to a domestic constitutional court, Sweet uses the metaphorical expression: 'if a duck-like creature looks, walks and quacks like a duck, then . . . even if it is not really a duck, I am going to call it one.'[97] International judicial review is doubly controversial because it involves condemnatory verdicts by foreign judges who are neither culturally connected nor directly and electorally accountable to the people to whom their decisions apply, and are usually seated in far flung places.[98]

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[90] Ibid. para 30.
[91] Application no. 013/2011, Judgment of 21 June 2013.
[92] Ibid. para 35.
[93] Compare C Buys 'The tensions between confidentiality and transparency in international arbitration' (2003) 121/14 *American Review of International Arbitration* 134-5.
[94] KF Gómez 'Rethinking the role of *amicus curiae* in international investment arbitration: how to draw the line favorably for the public interest' (2012) 35/2 *Fordham International Law Journal* 528.
[95] KN Schefer *International investment law: text, cases and materials* (2013) 544.
[96] NP Sagües, quoted in O Ruiz-Chiriboga 'The conventionality control: examples of (un)successful experiences in Latin America' (2010) 3/1-2 *Inter-American & European Human Rights* Journal 205.
[97] AS Sweet 'On the constitutionalisation of the Convention: the European Court of Human Rights as a Constitutional Court', Yale Law School Faculty Scholarship Series Paper 71, (2009) 5.
[98] HG Cohen *et al* 'Introduction: legitimacy and international courts' in HG Cohen, *et al* (eds) *The Legitimacy of International Courts* (2018) 1. See also S Bertelsen 'Consensus and the intensity of judicial review in the European Court of Human Rights' in R Arnold & JI Martínez-Estay *Rule of law, human rights and d judicial control of power: some reflections from national and international law* (2017) 298.

The decisions of international courts and tribunals are perceived as, and indeed are, extrinsic to the national democratic polities of states.[99] The voices and interests of common people are hardly taken into account, if at all. In addition, the African Commission and the African Court have also interpreted the doctrines of margin of appreciation and subsidiarity restrictively, thus making their review powers more extensive.[100] Supporters of an effective supranational adjudication may commend the extensive review powers of these bodies as exemplary. However, adherents of sovereigntism may see this as compromising national autonomy: a hallmark of juristocracy.

The exercise of such extensive judicial powers has in some cases attracted the courts some political backlash. Some resistance to the African Court has been reported.[101] The agenda of the international human rights law project is what Andersen describes as 'international legal imperialism'.[102] This is because it strives to put in place 'an international system that is genuinely constitutionally supreme with respect to both nation states and the people that, in the best of cases, they democratically represent.'[103] As the review powers of international human rights courts and tribunals deepen, the more international human rights law develops into a quasi-constitutional order and resembles domestic law. This development requires that international human rights law should be subjected to the same standards of legitimacy that underpin national law.[104]

Although national courts are independent to some appreciable degree, they are still deeply embedded in a domestic 'social basic structure' as part of the national democratic polity.[105] Key aspects of such domestic basic structures are usually under

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[99] J Turley 'Dualistic values in the age of international legisprudence' (1993) 44/2 *Hastings Law Journal* 185.

[100] For the African Commission decisions see: *Prince v South Africa* Communication 255/2002, para 53; For the African Court see, *Tanganyika Law Society & Another v United Republic of Tanzania* (n 88 above) para 73.

[101] TG Daly & M Wiebusch 'The African Court on Human and Peoples' Rights: mapping resistance against a young court' (2018) 14/2 *International Journal of Law in Context* 294–313. Examples of such backlash includes Rwanda's withdrawal from the jurisdiction of the Court in March 2016, following the lodgment of politically sensitive cases against it before this body.

[102] K Anderson 'The Ottawa Convention Banning Landmines, the role of international Non-Governmental Organizations and the idea of international civil society' (2000) 11/1 *European Journal of International Law* 104.

[103] Ibid.

[104] Compare, Bodansky (n 5 above) 611.

[105] J Rawls *The basic structure as subject, in political liberalism* (2005) 257.

democratic control and placed under check and balance by other state bodies. Nevertheless, while it may be said that there is a 'global basic structure' in the international legal order, there are no functional equivalents of the domestic legislative or executive institutions that may place the international judiciary under check.[106] This is despite the fact that there are some multi-level accountability measures of contested utility and significance in international law.[107]

In addition, international human rights courts and tribunals have formulated doctrines and concepts such as proportionality analysis, which derive precisely from domestic constitutional justice. These doctrines assist international human rights courts and tribunals to closely control the internal domains of states. However, international courts and tribunals lack coercive powers to enforce their judgments.[108] Instead, the continued execution of their judgments relies upon their legitimacy, which is largely predicated on public confidence and trust – all of which are connected to the process of decision making.[109]

Democratic legitimacy, is therefore, an important power source for international courts and tribunals and is critical to their continuing vitality.[110] Since the exercise of an expansive authority by a tribunal is attended by a concomitant diminution of national authority, there exists a need for the legitimation of such a tribunal.[111] As Merrills cautions, 'no court can work successfully unless its decisions are accepted by those whom we may term its audience, and … this will include the public, parties, states, and wider human rights community.'[112]

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[106] A Føllesdal 'The distributive justice of a global basic structure: a category mistake?' (2011) 10/1 *Politics Philosophy & Economics* 46.
[107] Waldron (n 35 above) 1346; A von Bogdandy 'The democratic legitimacy of international courts: a conceptual framework' (2013) 14/2 *Theoretical Inquiries in Law* 362.
[108] Voeten (n 21 above) 415.
[109] K Dzehtsiarou 'Does consensus matter? legitimacy of European consensus in the case of the European Court of European Rights' (2011) 3 *Public Law* 553.
[110] JA Conti 'Legitimacy chains: legitimation of compliance with international courts across social fields' (2016) 50/1 *Law & Society Review* 157; CD Creamer & Z Godzimirska '(De)legitimisation at the WTO dispute settlement mechanism' (2016) 49/2 *Vanderbilt Journal of Transnational Law* 278.
[111] For instance, see RH Bork *Coercing virtue: the worldwide rule of judges* (2003); EA Posner the perils of global legalism (2009); JA Rabkin Law without nations? why constitutional government requires sovereign states (2005).
[112] JG Merrills *The development of international law by the European Court of Human Rights* (1993) 30.

6.3 State-based consent theory and its limitations

As seen in Chapter 2, the traditional view is that the architecture of international law is based on positivist foundations of state consent. Adherents of the state-based consent theory believe that state consent suffices as the legitimatory basis for international regulation.[113] By extension, proponents of this logic believe that international courts and tribunals derive their democratic legitimacy from the consent of states to their jurisdiction.[114] The argument proceeds on the premise that owing to the independence and sovereignty of states, international courts and tribunals cannot justify their adjudicatory functions on matters involving states without their consent. In other words, the legitimacy of an international court derives from the act of delegation from member states.

Even in the context of adjudicative bodies where non-state actors can sue, such as regional human rights courts and tribunals, jurisdiction is still derived from the expression of state consent for legitimacy purposes.[115] This is because even in such courts, the state is the subject of the court's decision and it is therefore legally required to comply with it.[116] The state consent principle is predicated on the idea of a 'chain of legitimacy' or a 'democratic chain of legitimation,' which holds that public decisions derive their legitimacy from popularly elected representatives of the people.[117]

The conventional approach towards legitimacy in political governance is conceptualised on the basis of this doctrine, starting from the act of voting through to parliament and ultimately to the executive.[118] This finds expression in the words of

[113] R Wolfrum 'Legitimacy of international law and the exercise of administrative functions: the example of the international seabed authority, the international maritime organization (IMO) and international fisheries organizations' (2004) 9/1 *German Law Journal* 2040; D Hollis 'Why consent still matters: non-state actors, treaties and the changing sources of international law' (2005) 23/1 *Berkeley Journal of International Law* 244.
[114] J Klabbers *et al The constitutionalization of international law* (2009) 39; A Buchanan & RO Keohane The legitimacy of global governance institutions (2006) 20/4 *Ethics and International Affairs* 412–13.
[115] Grossman (n 15 above) 67.
[116] Dothan (n 21 above) 458.
[117] F Nullmeier & T Pritzlaff 'The great chain of legitimacy: justifying transnational democracy, tran-state,' Working Paper 123 (2010) 2.
[118] C Glinski 'Competing transnational regimes under WTO Law' (2014) 30/78 *Utrecht Journal of International and European Law* 46.

Keller, that 'all public acts ought to be retraceable to the democratic will of the people.'[119] She notes further:

> In essence, international law continues to be a system of rules that rest on the consent of the very states to which they apply. To the extent that international law is founded on state consent, then, the latter legitimizes the former. With regard to democratically organized states, a conceptual shift in the location of legitimacy may be assumed. As in these states all public acts ought to be retraceable to the democratic will of the people ("chain of democratic legitimation" […], a two-level consent for international norms can be pictured: directly, through the role of states in the context of international norm creation (international legitimacy); indirectly, through the legitimizing effect of the state's popular will as warranted by the democratic principle (domestic legitimacy).[120]

From this conceptualisation, the power of representatives of states who negotiate treaties and bind the state draws from the citizen's vote. Indeed, in some cases, national parliaments – which are plenary decision-making bodies in the national democratic polity, need to give their assent before any international agreement can bind the state.[121] Through this liberal contractualist paradigm, legitimacy is traceable to the assent of the people via the vote as already stated. This is in line with the Habermasian deliberative theory, which holds that the social context of human existence is structured in accordance with the idea of public reason, in terms of which the laws, including treaties, receive the assent of affected members of society.[122]

However, there is a growing concern among writers in critical scholarship that the legitimacy chain is deficient in material respects. The usual criticism is that these metaphorical chains are long, abstract, convoluted and hardly traceable.[123] In addition, it must be noted that the rules of international law do not emanate from treaties alone. Customary law, general principles of law, judicial decisions, the writings of highly qualified publicists[124] – all of these are important and universally acknowledged

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[119] H Keller 'Codes of conduct and their implementation: the question of legitimacy' in R Wolfrum & V Röben (eds) *Legitimacy in International Law* (2005) 257.
[120] Ibid. 257-258.
[121] C Zengerling *Greening International jurisprudence: environmental NGOs before international courts, tribunals, and compliance committees* (2013) 209.
[122] J Habermas referenced in R Eckersley 'A green public sphere in the WTO?: the *amicus curiae* interventions in the transatlantic biotech dispute' (2007)13/3 *European Journal of International Relations* 332.
[123] A von Bogdandy & I Venzke *In whose name? a public law theory of international adjudication* (2014) 157.
[124] See article 38 of the ICJ Statute, 1945. Available at http://www.icj-cij.org/en/statute (accessed 09 June 2018).

sources of international law, including international human rights law. These sources may bind the state without its consent.[125]

Moreover, the promise of a democratic legitimation chain can scarcely be achievable, as there are several non-democratic countries which themselves lack democratic-legitimacy.[126] Indeed, the African continent still harbours dictators who came to power through rigged elections or other unconstitutional means. The argument being maintained is that the present archaic language of state consent and control is no longer capable of adequately accounting for the exercise of public authority by the international judiciary.[127] Some writers have argued that while the democratic legitimacy chain can serve as a justificatory basis for many governmental actions, it does not fully support the establishment of an international court or tribunal operating beyond the populace's sphere of influence and control.[128]

As a result, these writers have found the state-based consent theory to be 'too morally anaemic' to constitute an adequate basis for international judicial decision-making.[129] It appears that the state consent principle was relatively unproblematic as long as international law was exclusively concerned with the regulation of inter-state relations to the exclusion of individuals. This concept does not fit the scheme of the international human rights treaty regime, which has the individual at its epicentre.

There is certainly something intrinsically constitutional in the very character, nature and subject matter of international human rights law. Its instruments are intended to regulate governments' treatment of their own citizens as well as of any other person within their territory. They specify and impose limits on what governments can lawfully do to people within their territory. Disciplining governmental action is perhaps the most paradigmatic case of a constitutional function exercised by any kind of international dispute settlement regime.[130] It is also important to note that the state consent theory is premised on at least two fundamentally flawed assumptions. The first is that a

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[125] W Schabas *The European Convention on Human Rights: a commentary* (2015) 231.
[126] Buchanan & Keohane (n 114 above) 418.
[127] PP Craig 'Democracy and rule-making within the EC: an empirical and normative assessment (1997) 3/2 *European Law Journal* 112 – 113.
[128] A Buchanan 'The legitimacy of international law' in S Besson & J Tasioulas (eds) *The philosophy of international law* (2010) 87.
[129] A Buchanan *Justice, legitimacy and self-determination: moral foundation for international law* (2004) 303.
[130] S Gardbaum 'Human rights as international constitutional rights' (2008) 19/4 *The European Journal of International Law* 752.

decision of an international court affects record parties only. The second is that the primary role of international courts and tribunals is to settle one-time disputes between state actors.[131]

These assumptions are anachronistic and out of keeping with modern international judicial practice. International courts and tribunals are important actors in global governance and their role is not limited to dispute settlement but extends to the creation, development and application of international law. In other words, when an international tribunal decides a question of international human rights law, it involves itself in the development of international quasi-constitutional norms and structures. The process by which international law is created and developed increasingly weakens the link between state consent and the existence of an obligation under international law.[132]

Although treaties give rise to obligations in relation to contracting states alone, they increasingly delegate powers to treaty-based bodies with a judicial or quasi-judicial character.[133] This means that although states have consented to the treaty from the outset as a legal framework to deal with certain specified issues, the specific rights and obligations are determined by these treaty-based bodies without their consent.[134] The legitimatory concerns arise not only when a court acts *ultra vires* its empowering statutes but also when it engages in law-making that might be deemed to be within its jurisdiction and competence but is nonetheless expansive.[135]

Through law-making, adjudicative bodies create new obligations that were not specifically incurred by states during the negotiation and subsequent ratification of a treaty, thus exacerbating legitimacy concerns. For instance, through the implied doctrine technique, the African Commission has created two additional rights to the African Charter *ex nihilo*: the right to housing and the right to food.[136]

On the strength of the foregoing logic, state consent is unlikely to be adequate to legitimate authoritative human rights supervisory organs possessing broad decision-

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[131] Grossman (n 15 above) 68.
[132] M Kumm 'The legitimacy of international law: a constitutionalist framework of analysis' (2004) 15/5 *European Journal of International Law* 914.
[133] Ibid.
[134] Ibid.
[135] Von Bogdandy & Venzke (n 9 above) 1346.
[136] *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*, Communication nos. 64/92, 68/92, 78/92, paras 60 – 63, on the right to housing; and paras 64 – 66 on the right to food.

making powers, such as those belonging to the African human rights system. This requires the construction of a supplemental justificatory basis for the exercise of public authority by the international human rights judiciary in general and the African regional human rights courts and tribunals. As correctly contended by von Bogdandy and Ingo Venzke, as they are autonomous institutions wielding public authority, the actions of international courts and tribunals 'require a genuine mode of justification that lives up to basic tenets of democratic theory.'[137] Can *amici curiae* help overcome this democratic-legitimacy deficit?

6.4 *Amicus* participation in the context of a democratic system

Like all regional human rights judicial and quasi-judicial mechanisms, the African regional human rights courts and tribunals decide cases of enormous constitutional salience, and therefore participate in the formulation and development of regional constitutional structures. In a democratic setup, this is a task that requires the participation of the people.[138] It has been argued that '[d]omestic acceptance of increasingly authoritative international decision-making in human rights will undoubtedly depend, in significant part, upon the democratic pedigree of such decisions.'[139] Democratic theorists have also compellingly advocated citizen participation in the formulation and application of policies that have a bearing on their lives.[140] The democratic argument supports the involvement of civil society actors in the resolution of cases.[141]It is believed that the democratic legitimacy of the judicial decision-making process is enhanced by the introduction of a plurality of voices in the process.[142]

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[137] A von Bogdandy & I Venzke 'In whose name? an investigation of international courts' public authority and its democratic justification' (2012) 23/1 *European Journal of International Law* 2.
[138] K Walker '*Amici curiae* and access to constitutional justice: a practical perspective' (2010) 22/3 *Bond Law Review* 112.
[139] Donoho (n 1 above) 18.
[140] WH Simon 'Solving problems vs. claiming rights: the pragmatist challenge to legal liberalism' (2004) 46/1 *William & Mary Law Review* 175. See also Marks *The riddle of all constitutions* (2000) 119.
[141] MD Adler 'Welfare polls: a synthesis' (2006) 81/6 *New York University Law Review* 1877-78; DM Estlund 'Who's afraid of deliberative democracy? on the strategic/deliberative dichotomy in recent constitutional jurisprudence (1993) 7/7 *Texas Law Review* 1437; EJ Lieb 'Can direct democracy be made deliberative?' (2006) 54 *Buffalo Law Review* 904.
[142] L Epstein & J Knight mapping out the strategic terrain: the informational role of *amici curiae*' in CW Clayton & H Gillman (eds) *Supreme Court decision-making: new institutionalist approaches* (1999) 215. See also R Salzman *et al* 'The determinants of the number of *amicus* briefs filed before the U.S. Supreme Court, 1953-2001' (2011) 32/3 *The Justice System Journal* 293.

According to Kamminga, NGO involvement in the international polity 'confers badly needed legitimacy on the international society.'[143] Similarly, Sikkink points out that in the global governance of human rights, greater civil society participation has led to greater legitimacy of the system, which as a result enhanced its effectiveness.[144] Houghton conceives NGOs as representing something of a global polity and suggests that they are included in 'deliberative processes as a way of overcoming what might otherwise be deemed a democratic deficit.'[145] Krajewski argues that NGOs can possibly be conceived as 'representing people on a functional basis' as they communicate 'societal concerns' at a transnational level and are not restricted to a particular territory (what is often described as a stakeholder model of representation).'[146]

In the African context, it has been said that the role of civil society is premised on the notion that the continent's social and political development must be based on the 'human progress of the African people.'[147] Therefore, international courts and tribunals must be rooted in a democratic foundation, administer justice in a community-oriented fashion and render decisions 'in the name of the peoples and the citizens.'[148] Drawing from the democratic theory, it is submitted that the institutional legitimacy of the African judicial and quasi-judicial bodies depends on their respect for democratic values. In fact, the replacement of the OAU with the AU was intended in part to ensure the

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[143] MT Kamminga 'The evolving status of NGOs under international law: a threat to the Inter-State System?' in P Alston (ed.) *Non-state actors and human rights* (2005) 98-99; JA Scholte 'Civil society and the legitimation of global Governance' (2007) 3/3 *Journal of Civil Society* 305; A Capling 'Democratic deficit, the global trade system and 11 September' (2003) 49/3 *Australian Journal of Politics and History* 375; J Crawford & S Marks 'The global democracy deficit: an essay in international law and its limits, in D Archibugi *et al* (eds) Re-imagining political community: studies in cosmopolitan democracy (1998) 83; T Squatrito 'Opening the doors to the WTO dispute settlement: state preferences on NGO access as *amici*' (2012) 18/2 *Swiss Political Science Review* 175.

[144] K Sikkink 'human rights' in A Acharya (ed.) *Why govern? Rethinking demand and progress in global governance* (2016) 133; PL Lindseth 'Democratic legitimacy and the administrative character of supranationalism: the example of the European Community' (1999) 99/3 *Columbia Law Review* 628.

[145] RA Houghton 'A puzzle for international law: NGOs at the United Nations' (2014) 2/2 *North-East Law Review* 6.

[146] M Krajewski 'Democratic legitimacy and constitutional perspectives of WTO Law' (2001) 35/1 *Journal of World Trade* 185. However, it is important to note that in some cases NGOs may represent sectoral as opposed to public interests.

[147] C Mutasa 'A critical appraisal of the African Union-ECOSOCC civil society interface' in J Akokpari *et al* (eds) *The African Union and its institutions* (2008) 291.

[148] Von Bogdandy & Venzke (n 123 above) 214; Simon (n 140 above) 175; Marks (n 140 above) 119; JG Ruggie 'Reconstituting the global public domain: Issues, actors and practices' (2004) 10/4 *European Journal of International Relations* 499-531.

participation of African peoples in the activities of the AU.[149] It is on this basis that the AU established the Economic, Social and Cultural Council (ECOSOCC) in 2004 as one of its seven organs in order to provide a platform for interaction between the African civil society and itself.[150]

ECOSOCC has been described as the '*vox populi* of the AU,'[151] and the 'vehicle through which the voice of the African people can make itself heard.'[152] It serves as an intelligent network and as a duct to transmit the values, ethos, knowledge and ideas of the African various segments of the African population into the AU policy processes.[153] The involvement of civil society in the Africa's human rights architecture is also based in part on instruments such as the Grand Bay (Mauritius) Declaration, which stresses the importance of the contribution of NGOs in advancing the course of human rights and rule of law on the continent.[154] Further, through the Kigali Declaration, the AU also encourages civil society to participate in decision making processes of the AU governance structures as part of democracy building initiatives.[155]

This participation of civil society in the structures of the AU is also vital in ensuring the institutional legitimacy of all the AU and its organs, including its judicial and quasi-judicial bodies that are under analysis in this study.[156] Institutional legitimacy requires that the courts and tribunals under study as well as their decisions must be accepted by parties to the litigation process and the community at large.[157] These bodies will be well advised to open their processes to interventions by civil society organisations, acting as friends of the court. It has been suggested that the *amicus* device symbolises

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[149] V Goel & MK Tripathi 'The role of NGOs in the enforcement of human rights: an overview' (2010) 71/3 *Indian Journal of Political Science* 777. See also Articles 3(g) & & 4(c), respectively of the AU Constitutive Act. This Act was adopted in 2000 at Lom*é* Togo, and entered into force in 2001.

[150] See article 1(h) and 22(1) & (2) the AU Constitutive Act, Ibid. See also K Sturman & J Cilliers 'ECOSOCC: bringing people's power to the African Union?' (2003) 12/1 *African Security Review* 71.

[151] F Viljoen International human rights law in Africa (2012) 208.

[152] MS Amr 'The the Economic, Social and Cultural Council of the African Union' in AA Yusuf & F Ouguergouz (eds) *The African Union: legal and institutional framework. a manual on the Pan-African organization* 180.

[153] Ibid.

[154] Grand Bay (Mauritius) Declaration and Plan of Action, 1999, paras 17 – 19. Available at http://www.achpr.org/instruments/grandbay/ (accessed 08 February 2016).

[155] Kigali Declaration, First AU Ministerial Conference on Human Rights, 2003, paras 8 – 10. Available at: http://www.achpr.org/instruments/kigali/ (accessed 08 February 2016).

[156] However, there remains serious a concern about the lack of civil society participation in the AU. Rhetoric has not been matched by practice. See O Jonas & B Seabo 'Making ECOSOCC work: present challenges and future prospects (2015) 6/1 *Afro Asian Journal of Social Sciences* 10. ('The involvement of CSO in the AU is near meaningless'.

[157] N Bürli '*Amicus curiae* as a means to reinforce the legitimacy of the European Court of Human rights' in S Flogaitis *et al* (eds) *The European Court of human rights and its discontents* (2013)143.

democratic inclusion and 'provides a dotted line between the court and the polity.'[158] This link serves to strengthen the court's institutional legitimacy.[159] It also ensures that decisions of the courts are 'connected with what people really think.'[160] This assists courts to increase their legitimacy capital among their constituents. Without this link, the legitimacy of the court concerned could disintegrate.

Because African regional human rights courts and tribunals are the *locus* for decisions with vast downstream political, economic and social implications for the AU region, it is vital that the voice of the African populace be heard in their judicial processes. The President of the African Court, Sylvain Oré, therefore, believes that there cannot be a legitimate justice without including a proper cross-section of the views of the relevant constituency in the African Court's processes.[161] Similarly, the former President of the African Union Commission on International Law, Kholisani Solo, believes that *amicus* briefs afford social movements a platform to participate in international judicial decision-making processes, thus potentially enhancing its democratic quality or pedigree.[162] A former member of the African Commission Musa Ngary Bitaye informed the writer hereof during an interview that *amici curiae* can be seen as a proxy for perceptions of the generality of society or the public.[163]

When speaking of participation by 'the public' in multilateral fora, we are engaging in a bit of a 'euphemism' because what is being referred to more precisely is the participation by NGOs representing individuals.[164] In a democracy-oriented understanding, the ultimate reference of an international court must be individuals, whose freedoms are shaped by judicial decisions, however implicitly.[165] In fact, an avant-garde opinion has been expressed that the individual is the true fundamental unit for the international legal order.[166] Therefore, for judicial authority to be considered

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[158] OS Simmons 'Picking friends from the crowd: *amicus* participation as political symbolism' (2009) 42/1 *Connecticut Law Review* 192.
[159] Ibid.
[160] R Alexy 'Balancing, constitutional review and representation' (2005) 3/4 *International Journal of Constitutional Law* 579 – 581.
[161] Interview with Justice Sylvain Oré, President of the African Court, 17 May 2017.
[162] Interview with Professor Kholisani Solo, former President of the African Union Commission on International Law, 13 May 2017.
[163] Interview with Musa Ngary Bitaye, former member of the African Commission, 9 November 2017.
[164] Bodansky (n 5 above) 619.
[165] Von Bogdandy & Venzke (n 123 above) 212.
[166] S Charnovitz 'The Illegitimacy of Preventing NGO Participation' (2011) 36/3 *Brooklyn Journal of International Law* 910.

legitimate, it must be accepted as an authority that is exercised on behalf of all those persons that are subject to it.[167]

Often, judicial decisions are imposed as *fait accompli* on subjects who were not afforded a chance to participate in a judicial process that yielded them. In this regard, *amicus* participation allows for a democratic input into an otherwise undemocratic system of governance.[168] It has been argued that 'a high level of public access to the dispute settlement process is necessary to ensure public acceptance of the result and the democratic accountability of the process.'[169] The argument that *amici curiae* can legitimate international judicial decision-making is premised on the thinking that the democratic legitimation of the international judicial decision-making process can be best served if the procedure in arriving at decisions has participatory elements.[170]

The very meaning and essence of a legitimate law is that it is made through 'radically participatory democracy.'[171] It is with this logic in mind that it has been noted that 'perhaps the *amicus* can, potentially at least, enhance public acceptance of the judicial process and decision by providing an opportunity (and a transparent mechanism) for all aspects of the dispute to be considered'.[172] Similarly, von Bogdandy and Venzke write that 'avenues for responding to problems in the justification of international courts' exercise of public authority may be found in an expansion of possibilities for intervention and participation.'[173]

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[167] EJ Criddle & E Fox-Decent *Fiduciaries of humanity: how international constitutes authority* (2016) 351.
[168] R Garcia 'A democratic theory of *amicus* advocacy' (2008) 35/2 *Florida State University Law Review* 319-20. See also Simmons (n 158 above) 199-202.
[169] JA VanDuzer 'Enhancing the procedural legitimacy of investor state arbitration through transparency and *amicus curiae* participation' (2007) 52/4 *McGill Law Journal* 685.
[170] Von Bogdandy & Venzke (n 123 above)178.
[171] H Baxter 'Habermas' sociological theory of law and democracy: a reply to Wirts, Flynn and Zurn' (2014) 40/2 *Philosophy and Social Criticism* 232.
[172] C Chinkin & R Mackenzie 'Intergovernmental organisations and friends of the court' in LB de Chazournes *et al* (eds) *International organizations and international dispute settlement: trends and prospects* (2002) 137.
[173] A von Bogdandy & I Venzke (n 9 above) 1364. See also L Cotula 'Democracy and International Investment Law' (2017) 30/2 *Leiden Journal of International Law* 377; E-U Pertersmann 'Human rights, international economic law and constitutional justice (2008) 19/4 *European Journal of International Law* 794; M Hunter & A Barbuk 'Procedural aspects of non-disputing parties in Chapter 11 arbitrations in T Weiler (ed.) *NAFTA Investment law and arbitration: past issues, current practice, future prospects* (2004) 176; T Zwart 'International courts and accountability gap' in G Anthony *et al* (eds) *Values in global administrative law* (2011) 212; J Koch 'Making room: new directions in third party intervention' (1990) 48/3-4 *University of Toronto Faculty Law Review* 152.

The insistence that international courts and tribunals require some kind of procedure for democratic participation and deliberativeness, can be attributed in part to the notable thinker of our age, Habermas, who has made the claim that, 'democratic procedure for the production of law evidently forms the only post metaphysical source of legitimacy'.[174] In the context of the African system, the former Chairperson of the African Commission, Ms Atoki has pointed out that the 'growth in the acceptance and legitimacy' of the African human rights system will depend, by and large, on the involvement of individuals and NGOs in its processes.[175] She adds that 'the weakness or strength of any human rights institution revolves around its normative and procedural scope … and above all the practice of all the relevant actors.'[176]

Chinkin and Mackenzie metaphorically express the view that the *amicus curiae* is the 'spokesperson for humanity' (or at least that segment of humanity represented by the author of the brief), as it articulates views that might not otherwise be put across in argumentation before an adjudicatory body.[177] It has also been said that NGOs function as 'unofficial ombudsmen' in human rights enforcement and application.[178] Other writers argue that *amicus* participation is a form of 'political symbolism' marking the courts' role in a democracy 'as a quasi-representative policy making institution'.[179] Specifically, the 'political symbolism' of *amicus* participation in judicial proceedings reassures the public, especially the marginalised minority and weak groups, of the courts' democratic character.[180]

For others, the *amicus* device is a form of speech and petition, which the courts cannot afford to take lightly.[181] In the United States, where the policy-making role of the

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[174] J Habermas *Between facts and norms: contributions to a discourse theory of law and democracy* (1998) 448. See also M Glasius 'Do international criminal courts require democratic legitimacy?' (2012) 23/1 *European Journal of International Law* 47.
[175] CD Atoki 'Opening speech by the former Chairperson of the African Commission at the Opening Ceremony of the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights, Yamoussoukro, Côte d'Ivoire, 9 – 22 October 2012.
[176] Ibid.
[177] Chinkin & Mackenzie (n 172 above) 155.
[178] W Korey *NGOs and the Universal Declaration of Human Rights: 'a curious grapevine'* (1998) 3.
[179] A Kawharu 'Participation of Non-Governmental Organisations in investment arbitration as *amici curiae*' in M Waibel *et al* (eds)*The backlash against investment arbitration: perceptions and* reality (2010) 284.
[180] Ibid.
[181] RL Tsai 'Conceptualizing constitutional litigation as anti-government expression: a speech-centered theory of court access' (2002) 51/5 *American University Law Review* 835.

Supreme Court has long been acknowledged,[182] the idea of using public interest groups as vehicles to channel the discursive views of the public into the courtroom began to gain traction during the 1970s. It was utilised by radical lawyers to reinforce their claims for access to justice for the under-privileged.[183] It is the courts' 'responsibility to facilitate democratic deliberation; to promote respect for the "marginalised other"; to allow a multiplicity of voices to be heard.'[184]

Conceived in that way, *amici curiae* facilitate public dialogue and debate on matters of public interest that have been brought before the courts. By definition, public interest is a 'texture of multiple strands' and 'not a monolith,'[185] and therefore pubic interest cases require broad-based public participation in the judicial decision-making process to ensure that a diversity of views, interests and ideas are put across in judicial calculus.[186] Seen in this light, the court presents an important site where hegemonic and counter-hegemonic forces meet and where opposing viewpoints are challenged and tested. Deliberations are pursued until the force of the better argument compels the other camp to accept the validity of the argument that is being pursued by the other.[187]

Through such intellectual competition, suggestions are accepted or rejected on the basis of their epistemic ability to withstand incisive scrutiny or dialogic examination. Legal debate also serves the rule of law, which is a salient feature of a democratic society. In this sense, litigation is seen as an interactive process in which contending epistemologies, philosophies, values and attitudes are scrupulously and faithfully evaluated and reflected.[188] The belief is that 'the ideal of the rule of law is far better served by lively debate than by wooden consensus because debate renders the law's

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[182] RA Dahl 'Decision-making in a democracy: the supreme court as a national policy-maker' (1957) 6/1 *Journal of Public Law* 279. See also M Perry *The constitution, the courts and human rights: an inquiry into the legitimacy of constitutional policymaking by the judiciary* (1982) 80.
[183] C Harlow 'Public Law and Popular Justice' (2002) 65/1 *Modern Law Review* 14.
[184] H Botha 'Judicial dissent and democratic deliberation' (2000) 15 *South African Public Law* 322.
[185] RB Stewart 'The reformation of American administrative law' (1975) 88/8 *Harvard Law Review* 1683.
[186] J Toop 'Multilateral environmental agreements and regional fisheries management organisations; experts, networks and global administrative law principles' in H Cullen *et al* (eds) *Experts, Networks and International Law* (2017) 113.
[187] IM Young 'Communication and the other: beyond deliberative democracy, in democracy and difference' in S Benhabib (ed.) *Democracy and difference: contesting the boundaries of the political* (1996) 120.
[188] For parity of reasoning, see G Majone 'Science and trans-science in standard setting' (1984) 9/1 *Science Technology and Human Values* 15.

many values perspicuous in the actual exercise of authority.'[189] This dialogic model of constitutionalism holds that a legal system is in the best state of health when there is conflict and dissent among its claims and propositions, 'because even irresolvable conflict is a sign of energy and attention.'[190]

The increased use of *amicus* briefs comports with the reasoning of constitutional writers that constitutional law should strive to reflect the will of the people.[191] This reasoning correlates with the theory of 'active liberty' developed by a former judge of the US Supreme Court, Stephen Breyer which also envisages an active participation of citizens in their government, which includes constitutional litigation and interpretation.[192] Thus, intervenors in the African system bear a great potential to act as a 'transmission belt' or 'communication channel' to feed the views of decision-recipients into the judicial decision-making sphere and make it more anthropocentric.[193] According to Bürli:

> *Amicus curiae* is based on the premise that in a democracy, people are in power to determine the law that governs them. However, the [courts] also have the authority to determine and develop the law that affects members of the civil society. Accordingly, if members of the public are able to present their arguments as *amicus curiae*, the [courts'] legitimacy in a democratic system is enhanced.[194]

Implied in the above passage is the notion that courts are required to apply the law in a manner that best represents the will, values and ethos of the people.[195] Public participation can also confer popular legitimacy by giving interested stakeholders a

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[189] CL Kutz 'Just disagreement: indeterminacy and rationality in the rule of law' (1994) 103/4 *Yale Law Journal* 1029; see also J Waldron 'The rule of law as a theater of debate' in J Burleyed (ed.) *Dworkin and his critics* (2004) 330.
[190] Kutz, Ibid. 1004.
[191] Garcia (n 168 above) 345.
[192] See generally S Breyer *Active liberty: interpreting our democratic constitution* (2005).
[193] Compare, C Krenn 'How the European parliament incites and monitors judicial reform through the budgetary process' (2017) 13/3 *European Constitutional Law Review* 470. See also A Spies 'The importance and relevance of *amicus curiae* participation in litigating on the customary law of marriage' (2016) 16/1 *African Human Rights Law Journal* 264.
[194] N Bürli *Third party interventions before the European Court of Human Rights* (2017) 118.
[195] LB Tremblay 'The legitimacy of judicial review: the limits of dialogue between courts and legislatures (2005) 3/4 *International Journal of Constitutional Law* 621. See also B Çali *et al* 'The legitimacy of human rights courts: a grounded interpretivist analysis of the European Court of Human Rights' (2013) 35/4 *Human Rights Quarterly* 959.

distinct sense of ownership in the curial process.[196] Seen in this way, the *amicus* device constitutes a fundamental tenet of due process. In human rights litigation, the end does not necessarily justify the means. Procedural justice is as important as substantive fairness itself, which comes at the end of the case.[197] People's contact with the law should not be limited to the outcome of the case. It must also extend to the manner or procedure in which the case was conducted. In this regard, it bears stating that what requires justification is the decision's authority, not its particular content.[198]

As seen earlier, a person might have thoughts that a decision is inequitable, misguided, unfair, unjust or just downright erroneous but still accept and own it as legitimate on the ground that it was rendered by a legitimate judicial or quasi-judicial body with an ear for the public.[199] Perception about procedural justice is a very important factor in influencing opinions about the legitimacy of an institution than the opinions relating to distributive justice (was the outcome fair and just).[200] It can be asserted that to a considerable extent, legitimacy is based on the court's operational procedures that lead to its decisions.[201] A tribunal interested in delivering justice effectively must have generous access to the views of individuals whose rights and interests are implicated whether or not they are parties to the suit, as a matter of good practice.[202]

According to Bryden, 'the willingness of courts to listen to interveners is a reflection of the value that judges attach to people.'[203] People must be afforded an opportunity to share their side of the story in their own words before a decision is taken.[204] Allowing people to speak, 'has a positive effect upon people's experience with the legal system,

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[196] Bodansky (n 5 above) 617; See also S Andresen & J Wettestad 'The effectiveness of international resource cooperation: some preliminary notes on institutional design' (1993) 13/2 *International Challenges* 67.
[197] FM Barnard *Democratic legitimacy plural values and political power* (2002) 27.
[198] L Green *The authority of the state* (1988) 4. See also H Pitkin 'Obligation and consent' (1965) 59/4 *American Political Science Review* 991.
[199] Bodansky (n 5 above) 602.
[200] E Brems & L Lavrysen Procedural justice in human rights adjudication: the European Court of Human Rights (2013) 35/1 *Human Rights Quarterly* 177.
[201] Bürli (n 157 above)144.
[202] I Brownlie 'The individual before tribunals exercising international jurisdiction' (1962) 11/3 *International & Comparative Law Quarterly* 719.
[203] P Bryden 'Public interest intervention in the court' (1987) 66/3 *Canadian Bar Review* 508–09; J Schacter 'The confounding common law originalism in recent Supreme Court statutory interpretation: implications for the legislative history debate and beyond' (1998) 51/1 *Stanford Law Review* 47.
[204] TR Tyler 'Procedural justice and the courts' (2007-2008) 44/1-2 *Court Review: The Journal of American Judges* 30.

irrespective of their outcome, as long as they feel that the authority sincerely considered their arguments before making their decision.'[205] This is part and parcel of the advance towards a more people empowering international legal order: an order established by people for the people and not states alone.

It has been argued that it is in the long-term institutional interest of the international courts and tribunals to show that their case outcomes take into account the public interest, over and above the concerns of the direct parties.[206] This is because the participation of non-parties also helps build the image, standing and prestige of the courts as institutions. However, opening judicial and quasi-judicial proceedings to non-parties is not to suggest that a judicial or quasi-judicial body is a parliamentary assembly or that a court of law must be turned into a court of public opinion. In the words of von Bogdandy and Venzke, the proposal is not to bring 'the noise of popular assemblies to the quiet halls of learnt justice.'[207] The decorum of the courts should still be maintained as these courts are not political freeways to which all and sundry should have access.[208] It is the courts' formal character that distinguishes them from other fora and has preserved their continuing vitality.

The *raison d'être* of the courts is to protect legal interests. It is, therefore, appropriate for access to be granted only to those who can show that they are bringing new approaches to the decisional calculus. If we permit the bustling politics into the courts, we may end up undermining the integrity and solemnity of the court as a temple of justice, for which judicial bodies are esteemed. This will inevitably compromise their legitimacy rather than promoting it. It is fully understood that courts of law and such-like bodies operate under greater 'cognitive isolation' than political bodies and should, therefore, not be turned into unregulated arenas for political quibbling.[209] Be that as it may, courts of law must not resort to rigid ceremonialism and foreclose or undermine *amicus* participation.

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[205] Ibid.
[206] J Viñuale '*Amicus* intervention in investor-state arbitration' (2006/2007) 61/4 *Dispute Resolution Journal* 75.
[207] Von Bogdandy & Venzke (n 123 above) 134.
[208] Harlow (n 183 above) 2.
[209] L Crema 'Testing *amici curiae* in international law: rules and practice' (2012) 22/1 *Italian Yearbook of International Law* 96.

6.5 Overcoming the confidentiality controls of the African Commission and the African Children's Rights Committee

The democratic legitimacy deficit of the African human rights enforcement system is exacerbated by the fact that the complaint procedures of the African Commission and the African Children's Committee are obsessively confidential, and therefore, opaque. If the confidentiality requirement of the African Commission is observed strictly, this effectively eliminates one of the potent weapons for the enforcement of human rights, namely, publicity.[210] The resulting opacity could be seen as damaging to the democratic legitimacy of the entire African human rights treaty regime. As the Sutherland Report of 2004 noted in the context of the WTO judiciary, 'the degree of confidentiality of the current dispute settlement proceedings can be seen as damaging to the WTO as an institution.'[211]

The confidentiality controls characterising the African quasi-judicial bodies stand in conflict with the principal objective of the democratic theory which emphasises the celebrated transparency of modern democratic justice systems.[212] Some countries, notably the US, have taken a deliberate and principled position against secrecy in judicial proceedings.[213] The utmost opposition to the hearing that unfolds outside the public eye lies in its being a radical aberration from 'the hard-won and established principle of full publicity in [curial] proceedings'.[214] It is therefore vital that proceedings of judicial bodies must be open to the public to allow for intervention by individuals, NGOs and groups.

Participation is a core element of the rule of law and democracy. It fosters accountability in decision-making. No one should be excluded from judicial proceedings except where such an exclusion is merited by legitimate and weighty countervailing or overriding considerations. These could for instance be on the

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[210] UO Umozurike 'The African Charter on Human and Peoples' Rights: suggestions for more effectiveness' (2007) 13/1 *Annual Survey of International & Comparative Law* 182.
[211] P Sutherland *et al The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (2004), paras 261, et seq.
[212] ST Ebobrah 'International human rights courts' in C Romano *et al* (eds) *The Oxford handbook of international adjudication* (2014) 237.
[213] G Gensey & GR Winham 'International law, dispute settlement, and autonomy' in LW Pauly & WD Coleman (eds) *Global ordering: institutions and autonomy in a changing world* (2008) 50.
[214] HH Baker 'Private hearings: their advantages and disadvantages' (1910) 36/1 *The Annals of the American Academy of Political and Social Science* 83.

grounds of national security, or the privacy of minors; or where the brief is evidently unseemly and sanctionable. It is said that transparency in the international legal system can be traced as far back as the philosopher Kant's famous treatise, 'Perpetual Peace.'[215] In a powerful statement, Kant states that, 'all actions that affect the rights of other men are wrong if their maxim is not consistent with publicity.'[216]

Kant's message underscores the important value placed on maintaining transparency in judicial and quasi-judicial processes that have implications for public interest. Implicit in his statement is the idea that citizens will consider it as an unfair proceeding or abuse of process if a judicial or quasi-judicial hearing were to be held in privacy.[217] Judicial proceedings need to be open and transparent, if only to satisfy the important principle of public justice.[218] It therefore appears natural to insist that there must be openness in the complaint procedures of supervisory organs of the African human rights system in order to enhance the democratic quality and acceptance of their decisional outcomes and ensure second-order compliance.

It is no longer tolerable (if ever it was) for faceless and unelected officials of multilateral interpretive organs to sit in judgment over the destiny of litigants in obscure and dark rooms. It is important to bear in mind that 'transparent argumentation is a necessary and probably unique way to ensure the public confidence and the very authority of the court.'[219] It is now acknowledged that 'the legitimacy of international law can be strengthened if international fora are rendered more transparent and more open for participation by a wide range of groups and interests from different sectors and segments of society'.[220] The public interest character and other social demands in human rights litigation make it supremely imperative that a human rights adjudicative body must be transparent and open to public scrutiny.

The Investment Committee of the Organisation of Economic Cooperation and Development (the OECD Committee) has correctly noted that '[t]he traditional manner

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[215] S Charnovitz 'WTO Cosmopolitics' (2002) 34/2 *New York University Journal of International Law and Politics* 301.
[216] Quoted in S Charnovitz *The path of world trade law in the 21 century* (2014) 125.
[217] J Keller 'The future of *amicus* participation at the WTO: implications of the sardine's decision and suggestions for further developments' (2005) 33/3 *International Journal of Legal Information* 461.
[218] Harlow (n 183 above) 16.
[219] M Safjan 'Politics and constitutional courts: a judge's personal perspective'2008/10 European University Institute Working Paper, 7.
[220] A-K Lindblom *Non-Governmental Organisations in International Law* (2005) 524.

in which governmental measures are reviewed for compliance with international law in a private setting, i.e confidential in camera proceedings, has come under increased scrutiny and criticism.'[221] A multilateral decision-making mechanism 'should be transparent and give people an opportunity to participate (participatory legitimacy).'[222] One method of addressing the transparency concerns at the African quasi-judicial bodies would be to call for the greater participation of *amici curiae* before these bodies.[223]

Confidentiality controls make it difficult for public interest to be represented in curial processes and this undermines democracy. There is, therefore, a necessity for a form of '*avocat general*' to pry open the mechanisms concerned and articulate the views of the public, and for lack of a better institution – an *amicus curiae*.[224] In the international judicial decision-making space, where flaws of publicity and the legitimacy of decisions are revealed, *amicus* participation has the effect of enhancing the connection between, and fostering dialogue between decision-makers and the decision-recipients.

Extending the ideals of participatory democracy through *amicus* participation bears the potential to enhance the transparency and accountability of the African quasi-judicial bodies, and therefore the popular legitimacy of the African human rights enforcement system as a whole. The increased acceptance of *amicus* briefs by the African Commission and the African Children's Committee would therefore, to use the words of Levine, 'incorporate broader policy considerations into the dispute resolution process and add a measure of transparency.'[225] It was stated in *Methanex v USA*[226] that *amici curiae* 'allay public disquiet as to the closed nature of proceedings.'[227] To

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[221] Report, 'Transparency and Third-Party Participation in Investor-State Dispute Settlement Procedures' Statement by the OECD Investment Committee [OECD Report] (2005) 1. Available at: http://www.oecd.org/dataoecd/25/3/347+86913.pdf (02 March 2016)

[222] Bodansky (n 5 above) 622.

[223] Compare, MM Mbegue & M Tignino 'Transparency, public participation and *amicus curiae* in water disputes' in LB Chazournes *et al* (eds) *Fresh water and international economic law* (2005) 367; C Knahr & A Reinisch 'Transparency versus confidentiality in international arbitration' (2007) 6/1 *Law and Practice of international courts and tribunals* 97 – 118.

[224] A Mourre 'Are *amici curiae* the proper response to the public's concern on transparency in investment arbitration' (2006) 5/2 *Law and Practice of International Courts and Tribunals* 266.

[225] E Levine '*Amicus curiae* in international investment arbitration: the implications of an increase in third party participation' (2011) 29/1 *Berkeley Journal of International Law* 200. See also L Mistelis 'Confidentiality and third-party participation: *UPS v. Canada and Methanex Corp. v. USA*' in T Wiler *International Investment Law and Arbitration* (2005) 185.

[226] Final Award on Jurisdiction and Merits, (2005) 44 ILM 1345, 19 August 2005.

[227] Ibid. para 5.

act otherwise would be to rob the African public of all reasonable expectations of a modern judicial practice.

The OECD Investment Committee has taken the view that, 'especially insofar as proceedings raise important issues of public interest, it may also be desirable to allow third party participation.'[228] This Committee has also explained that 'transparency in [international dispute settlement regimes] … is desirable to enhance effectiveness and public acceptance of international investment arbitration, as well as contributing to the further development of a public body of jurisprudence,' suggesting that *amicus* interventions could be used to serve these objectives.[229] In the United States, it is also said that the *amicus* brief is an integral feature of the US court system, serving to enhance the transparency, and therefore the democratic legitimacy of the court system.[230]

Allowing diverse interest groups to enter proceedings in the dark rooms of the African Commission and the African Children's Committee and encode or include the voices of the African people in case outcomes will demonstrate to the world that these bodies are concerned about issues of public interest. In addition, by opening their portals to *amici curiae*, the concerned bodies undoubtedly communicate a positive message about their accessibility by the public. This will undoubtedly earn the African human rights systems a favourable perception of democratic legitimacy from the public.

Many international investment arbitral bodies have also specifically advocated *amicus* participation in their litigation for greater transparency in public interest cases.[231] In particular, arbitral rules have been liberally interpreted as permitting such intervention, especially where a case contains a public interest element, and in response to transparency concerns.[232] The reasoning and approach of these bodies is *mutatis*

[228] OECD Report (n 221 above) 1.
[229] Ibid.
[230] Garcia (n 168 above) 319.
[231] E De Brabandere 'NGOs and the "public interest": the legality and rationale of *amicus curiae* interventions in international economic and investment disputes' (2011) 12/1 *Chicago Journal of International Law* 105. See also J Razzaque 'Access to remedies in environmental matters and the North-South divide' in S Alam *et al International Environmental Law and the Global South* (2015) 601.
[232] S Lamb *et al* 'Recent developments in the law and practice of *amicus* briefs in investor-state arbitration (2017) 5/2 *Indian Journal of Arbitration Law* 72.

mutandis applicable to human rights adjudication. In the *Methanex* case,[233] the NAFTA Tribunal has stated that:

> The Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.[234]

Similarly, in the *United Parcel Service of America* case,[235] the Tribunal stated that an *amicus* intervenor was admitted to the case on account of the 'appreciation of the contribution that transparency brings to building public confidence in the … dispute settlement process.'[236] The arbitral Tribunal emphasised the role and significance of *amicus curiae* in enhancing the transparency, openness and accountability of tribunals whose litigation process is closed to public scrutiny.[237]

In *Biwater Gauff (Tanzania) v Republic of Tanzania*,[238] the Tribunal noted that even if the public interest considerations were found to be limited in a case, the *amicus* participation was still valuable as it brought increased transparency to the proceedings.[239] Thus, it proceeded to accept a joint brief from five NGOs that had requested to intervene.[240] In *Aguas Argentinas v Agentina*,[241] the arbitral Tribunal also made the observation that public acceptance of the legitimacy of international dispute settlement regimes would be best served 'through the participation of … civil society.'[242] Likewise, in *Philip Morris v Uruguay*,[243] the ICSID Tribunal noted that 'in view of the public interest in the case, granting the [applications for interventions] would support the transparency of the proceeding and its acceptability by users at large.'[244]

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[233] *Methanex* case, n 226 above.
[234] Ibid. 49.
[235] *United Parcel Service of America Inc. v Government of Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae*, ICSID Case no. UNCT/02/1, Award of 17 October 2001.
[236] Ibid. para 51.
[237] Ibid. para 70.
[238] Case no. ARB/05/22, Award of 27 November 2006.
[239] Ibid. para 54.
[240] Ibid. para 72.
[241] Case no. ARB/97/3, Award of 19 May 2005.
[242] Ibid. para 22.
[243] Case no. ARB/10/7, Procedural Order no. 3 of 17 February 2015 and Procedural Order no. 4, Award of 24 March 2015.
[244] Ibid. para 28.

In the context of international criminal trials, the accountability and transparency roles of *amici curiae* were best illustrated in the *Akayesu* case,[245] before ICTR. In that case, a group of NGOs intervened as *amici curiae* to ensure that the prosecutorial discretion was not being abused in relation to the charges to be included in the indictment.[246] The *amicus curiae* was critical in this regard as a scrutiny procedure. Overall, it is argued that it is important for a court or tribunal to be receptive to *amicus* participation in order to enhance the transparency and accountability of its litigation, especially when a dispute before the body in question has a public interest element. As such, transparency and accountability can only create a good perception of the public about the African human rights system.

6.6 The critique of the legitimatory claims of *amici curiae*

The claim that *amici curiae* have a legitimatory role in international judicial decision-making process has not received universal support in the community of legal commentators.[247] It has been argued by some scholars that rather than enhancing the legitimacy of international litigation, *amici curiae* may undermine its legitimacy as NGOs who constitute the bulk of third party actors in international litigation lack accountability, transparency and representativeness to any constituency.[248] During the last couple of decades there has been a phenomenal expansion of the number of NGOs working across borders.[249] Certain writers have noted that the world is experiencing a 'power shift' towards NGO actors, and others have spoken of a 'global associational revolution.'[250]

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[245] *Prosecutor v Akayesu*, Case no. ICTR–96–4–T, Judgment of 2 September 1998.
[246] See L Bartholomeusz 'The *amicus curiae* before international courts and tribunals, non-state actors and international law' (2005) 5/3 *Non-State Actors and International Law* 284.
[247] F El-Hosseny *Civil society in investment treaty arbitration* (2018) 14.
[248] D Olowu 'The African Charter on Human and Peoples' Rights, its regional system, and the role of civil society in the first three decades: calibrating the "paper tiger" (2013) 34/1 *Obiter* 45; M Schweitz 'NGO participation in international governance: the question of legitimacy' (1995) 89/1 *American Society of International Law Proceedings* 415; P Alston 'The 'not-a-cat' syndrome: can the international human rights regime accommodate non-state actors?' in P Alston (ed.) *Non-state actors and human rights* (2005) 3-36; FD Simões '*Amicus curiae* in the trans-pacific partnership' (2017) 54/1 *American Business Law Journal* 193.
[249] V Collingwood 'Non-governmental organisations, power and legitimacy in international society' (2006) 32/3 *Review of International Studies* 440.
[250] J Matthews 'Power Shift' (1997) 76/1 *Foreign Affairs* 50–66. See also LM Salamon 'The rise of the non-profit sector' (1994) 73/4 *Foreign Affairs* 109-122.

NGOs seek ways and strategies of enforcing international law.[251] The fear is that the influence of these actors in the global system may disrupt the inter-state system.[252] Charnovitz correctly points out that NGOs 'have exerted a profound influence on the scope and dictates of international law' adding that 'had NGOs never existed, international law would have played a less vital role in human progress.'[253] With reference to the African system, Welch Jr notes that without NGOs' input, the entire human rights agenda on the continent would be brought to naught.[254] Not only are there numerous NGOs on the global scene but the number of activities that they engage in has also multiplied.

The proliferation of NGOs and the multiplication of their roles as well as the exponential increase in their influence have triggered a debate about the legitimacy of transnational NGO involvement in global multilateral systems.[255] Some writers have noted that the growing authority and influence of NGOs on the international scene is remarkable, given the fact that they lack legal power to set international norms and standards, let alone to mete out sanctions for failures to implement these norms and standards.[256] They contend that these entities are mere voluntary associations, predominantly self-regulating, without external sources of legitimacy.[257]

Yet, as Boli and Franck note, NGOs act as if 'they were authorised in the strongest possible terms'.[258] These critics argue that NGOs have no accountability measures except in relation to donors – for fear of the withdrawal of funding.[259] One of the fiercest

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[251] Harlow (n 183 above) 12.
[252] Kamminga (n 143 above) 387.
[253] S Charnovitz 'Nongovernmental Organizations and International Law' (2006) 100/2 *American Journal of International Law* 348. See also D Weissbrodt 'Roles and responsibilities of non-state actors' in D Shelton (ed) *The Oxford handbook of international human rights law* (2013) 721.
[254] CE Welch Jr 'Human rights and development in Africa: NGOs in PT Zeleza & PJ McConnaughay (eds) *Human rights, the rule of law and development in Africa* (2004) 200.
[255] Collingwood (n 249 above) 440.
[256] A Hegarty *Human rights: 21st century* (1999) 283.
[257] Ibid.
[258] J Boli & GM Franck 'World culture in the world polity: a century of international non-government organisation' (1997) 62/2 *American Sociological Review* 181. See also TM Franck 'The power of legitimacy and the legitimacy of power: international law in an age of power disequilibrium' (2006) 100/1 *American Journal of International Law* 88 -106.
[259] See for instance, A Ebrahim 'Accountability in practice: mechanisms for NGOs' (2003) 31/5 *World Development* 814; PJ Spiro 'The democratic accountability of Non-Governmental Organisations' (2002) 3/1 *Chicago Journal of International Law* 166; A Florini, *The Third Force: The Rise of Transnational Civil Society* (2000) 3; V Collingwood & L Logister 'State of the Art: addressing the INGO 'legitimacy deficit' (2005) 3/2 *Political Studies Review* 175–92; J Mertus 'From legal transplants to transformative justice: human rights and the promise of transnational civil society' (1999) 14/5 *American University International Law Review* 1372-73.

opponents of the theory that NGOs legitimise international law is Franck who writes that:

> If you continue indefinitely to transfer authority over really important issues that affect people's interests to institutions that do not even have a pretense of representativeness, you will have the seeds of self-destruction. Not only do NGOs not address that problem because they are in no sense a substitute for some direct form of representation of people in the process which normally one thinks of as parliamentary representation .... NGOs are irrelevant, they do not in any sense legitimate the decision-making process. They may make it better, sometimes they may make it worse, but the legitimacy deficit is not addressed by them ...[260]

In sum, writers have called into question the extent to which NGOs can be said to be truly representative of communal interests, 'which raises the question of who represents what to whom'.[261] The gravamen of the illegitimacy argument is that NGO participation in the international legal order can be said to ameliorate democratic deficit and enhance the legitimacy of the international fora only if the relevant NGOs are themselves legitimate advocates of a public cause. Another concern has been raised that although NGOs from the Global South have become increasingly active before multilateral norm making bodies, they still remain 'outsiders'.[262]

The question about the legitimacy of the representative function of NGOs doing human rights work in Africa has received relatively little attention in the existing literature. This is surprising given the fact that most of these organisations are those that are well-funded and are based outside the continent.[263] This exacerbates the legitimacy concerns. It has been observed that most of the influential NGOs on the African continent cannot be said to be grassroots organisations.[264] There is a disconnect between NGOs and the constituencies they claim to represent. Operating within the context of the African human rights system, one often finds mostly 'professionalised

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[260] TM Franck 'Individuals and groups as subjects of international law' in Hoffmann R & N Geissler (eds) *Non-state actors as new subjects of international law: international law – from the traditional state order towards the law of the global community* (1999) 152.
[261] L Gordenker & TG Weiss 'NGO participation in the international policy process (1995) 16/3 *Third World Quarterly* 553.
[262] M Mutua 'Standard setting in human rights: a critique and prognosis' (2007) 29/3 *Human Rights Quarterly* 606.
[263] JP Pham 'Human rights, the rule of law, and development in Africa: book review' (2005) 5 *Human Rights and Human Welfare* 35.
[264] OC Okafor 'Modest harvests: on the significant (but limited) impact of human rights NGOs on legislative and executive behaviour in Nigeria' (2004) 48/1 *Journal of African Law* 25.

organisations which do not aim at mobilising a mass constituency … but [r]ather, … tend to focus on influencing a liberal and educated elite on behalf of people in faraway countries.'[265]

It has been contended in relation to NGO work in Africa, '[t]he relationship between NGOs and the masses … remains, at best, that of benefactors and beneficiaries. This cannot be the best of relationships if the real concern is genuine activism with, as opposed to for, the people.'[266] The work of NGOs should be rooted in the lived experiences of the people.[267] Blackaby and Richard rhetorically ask how it can be said that a Washington-based NGO could possibly represent Tanzanian citizens, for instance, and what places it in good stead to advocate their interests.[268] Such a transnational counter-majoritarian process raises questions about who is suited or entitled to participate in democratically legitimated international adjudication.

A view has been expressed that 'the concern is that *amicus* briefs reflect the interest of the organisations that are not aligned to the experience of individuals and organisations based in developing states.'[269] The problem of the disconnect between the intervenor and the constituency is particularly acute when non-African groups submit briefs containing ideological arguments. As argued in Chapter 5, the interpretive organs of the African human rights system are required to draw inspiration and guidance from African values, history, traditions, ethos, beliefs and heritage in interpreting the African bill of rights. There is a broadly shared concern among African writers that the human rights discourse and practice prevalent on the African continent is not responsive to or reflexive of Africa's particular situation as it is often driven by western donors through the agency of NGOs, and imposed on Africa.[270]

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[265] R Murray 'The Role of NGOs and Civil Society in Advancing Human Security in Africa' in A Abass (ed.) *Protecting human security in Africa* (2010) 342.
[266] IG Shivji IG *Silences in NGO discourse: the role and future of NGOs in Africa* (2007) 54. See also CM Peter 'Coming of age: NGOs and state accountability' in M Mutua (ed.) *Human Rights NGOs in East Africa* (2009) 317.
[267] DW Nabudere 'Social transformation in Uganda: a study of grassroots NGOs' in M Mutua (ed.) *Human Rights NGOs in East Africa* (2009) 259.
[268] N Blackaby & C Richard '*Amicus curiae*: a panacea for legitimacy in investment arbitration' in M Waibel (ed.) *The backlash against investment arbitration: perceptions and reality* (2010) 269.
[269] N Klein 'Who litigates and why' in CPR Romano *et al* (eds) *The Oxford handbook of international adjudication* (2015) 589.
[270] A Branch 'Book review, Human Rights NGOs in East Africa: political and normative tension, by Mutua)' (2010) 32/1 *Human Rights Quarterly* 216.

It is said that overbearing donor influence has the pernicious capacity to distort local NGOs' 'vision for human rights agency and social transformation.'[271] The fear is that over-reliance on Western NGOs risks reiterating, reproducing and entrenching western human rights epistemologies in the conceptualisation and application of the law in Africa. This may be perceived as perpetuating a colonial agenda that robbed Africa of its voice and heritage.[272] Indeed, for a judicial decision to receive wide acceptance in a society, the content of such a decision must meet certain moral standards and cultural presuppositions that are found in that society.[273] It is in this context that the African Commission has held that '[t]he African Charter should be interpreted in a culturally sensitive way, taking into full account the differing legal traditions of Africa and finding expression through the laws of each country.'[274]

Ideological submissions by non-African groups may not reflect the African value system. In addition, non-African organisations can hardly serve as a barometer for the African citizenry's opinions in cases that they participate in. Less problematic are submissions by non-African organisations which seek to assist the court with the general principles of international law or background information relating, for instance, to the political situation of a state being sued for human rights violations. It is contended that African NGOs should take the lead in engaging with African regional supervisory organs in relation to the human rights situations of their own countries.[275]

Such NGOs may assist in addressing the perception that although the human rights project is well-meaning, the development, discourse and implementation of rights represent a Eurocentric hegemony or construct for the re-organisation of non-western societies and peoples to reflect Western biases. Regrettably, this is not always possible given the internal obstacles such as the undue legal restrictions and harassment of African human rights NGOs within their societies. Consequently, many

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[271] C Ngondi-Houghton 'Donors and human rights NGOs in East Africa: challenges and opportunities' in M Mutua (ed.) *Human Rights NGOs in East Africa* (2009) 157.
[272] ME Adjami 'African courts, international law, and comparative case law: chimera or emerging human rights jurisprudence?' (2002) 24/1 *Michigan Journal of International Law* 120.
[273] M van Hoecke 'Judicial review and deliberative democracy: a circular model of law creation and legitimation' (2001) 14/4 *Ratio Juris* 415.
[274] *Rights Project and Another v Nigeria*, Communication nos. 140/94, 141/94 and 145/95, para 26.
[275] AA Ankumah *The African Commission on Human and Peoples' Rights: practice and procedures* (1996) 93.

local NGOs have resorted to establishing links with larger, better funded and predominantly Western-based organisations.[276] This has prompted Mutua to raise accusations that '[t]he human rights movement in the [African] region is a rump extension of the so-called international human rights movement, which originated and is headquartered in the industrial democracies of the West.'[277]

According to Mutua, the extraversion of human rights in Africa promotes the most destructive pathologies on the continent and undermines one of the basic tenets of the human rights corpus, namely, self-determination.[278] It is undesirable for African NGOs to mirror the approaches of foreign-based NGOs especially given the fact that it is local interest groups that enjoy close proximity to real-life contexts within which human rights violations on the African continent occur.[279] Likewise, Ngondi-Houghton laments that local African NGOs have absorbed a neo-liberal human rights ideology that is at best inapplicable and at worst antithetical to the realisation of human rights in Africa.[280]

Despite the concerns associated with the non-representativeness of NGOs, it is generally accepted by writers that civil society involvement in the international decision-making processes supplies the badly needed democratic legitimacy to the international legal order and makes civic conversations on the global plane healthy. While the legitimacy concerns raised in relation to NGO participation in international law by some writers require earnest consideration, their seriousness must not be over-stated. For instance, the sweeping claim that NGOs are haunted by legitimacy problems because they are not representative as they lack a constituency-given mandate is inaccurate in some cases. Some NGOs are membership-based, while some are mass-based and work with and not for the people, and can be said to be genuinely part of the domestic democratic polity.

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[276] Welch Jr. '(n 254 above) 204 – 205.
[277] M Mutua 'Human rights NGOs in East Africa: defining the challenges' in M Mutua (ed.) *Human Rights NGOs in East Africa* (2009) 18. See also K Appiagyei-Atua 'NGOs and their role in the promotion and protection of rights in Africa' (2009) 9 *International Journal on Minority and Group Rights* 274.
[278] Mutua, Ibid. 30.
[279] JT Gathii & C Nyamu 'Reflections on United States-based human rights NGOs' work on Africa' (2006) 9 *Harvard Human Rights Journal* 295.
[280] Ngondi-Houghton (n 271 above) 157; GW Wright NGOs and Western hegemony: causes for concern and ideas for change (2012) 22/1 *Development in Practice* 124. OC Okafor *Legitimising human rights NGOs: lessons from Nigeria* (2006) 14.

In addition, legitimacy is a 'multi-dimensional phenomenon' and as such it can be achieved through other means such as the use of the communicative public sphere.[281] In other words, the functionality of NGOs requires them to be given a voice and not a vote in global standard-setting processes in order to communicate the concerns of the public. Accordingly, one is able to conclude that 'some form of NGO representation in the institutions involved in multilateral governance ... could help to maintain their legitimacy'.[282] Thus, although the *amicus curiae* is not as representative as a proper legislature, and therefore cannot become its substitute, it still supplies some legitimacy and transparency to the international judicial decision-making process.[283] However, it must be stressed that African judicial and quasi-judicial bodies can be democratically legitimated only by African-based NGOs who can be said to be genuinely connected with the African people.

6.7 Interim conclusion

The judicial review procedure of the African judicial and quasi-judicial bodies is gaining enormous influence. This is inevitably sparking concerns about the democratic-legitimacy of these bodies. It has been said that the international enforcement system is characterised by a dominating judiciary with weak legislative and executive counter-measures, resulting in an enormous democratic-legitimacy deficit.[284] This situation raises misgivings about the domination of the international legal order by an unaccountable, unelected, and unrepresentative 'juristocracy,'[285] whose suitability to make critical choices concerning social conditions within states is controversial.[286]

The concerns about the democratic legitimacy of human rights judicial decision-making relates to the capacity of human rights adjudicatory bodies to hand down

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[281] Ibid. 283-284.
[282] RO Keohane & J Nye Jr., 'The club model of multilateral cooperation and problems of democratic legitimacy' in RB Porter *et al* (eds) *Efficiency, equity, and legitimacy: the multilateral trading system at the millennium* (2001) 289 – 290.
[283] Zengerling (n 121 above) 193.
[284] M Krajewski 'Legitimizing global economic governance through transnational parliamentarization transformations of the state' Collaborative Research Center 597, Trans State Working Papers 136 (2010) 11 et seq.
[285] A Føllesdal 'Much ado about nothing? International judicial review of human rights in well-functioning democracies' in A Føllesdal *et al* (eds) *The legitimacy of international human rights regimes legal, political and philosophical perspectives* (2013) 277.
[286] Y Shany 'Toward a general margin of appreciation doctrine in international law?' (2006) 16/5 *European Journal of International Law* 920.

binding decisions and rules that may displace domestic popular preferences and prerogatives.[287] The present chapter has also noted that the opacity of the complaints' procedures of the African Commission and the African Children's Committee is one of the elements of the democratic deficit critique in the African system. Notwithstanding the legitimacy concerns of NGOs, the participation of *amici curiae* in the international legal system remains the most promising procedure to ameliorate the democratic legitimacy deficit of the African human rights system. It can achieve this by opening up possibilities for NGO and individual participation in its judicial decision-making processes.

In a constitutional or quasi-constitutional order, decisions of bodies that exercise public authority are legitimated if they are taken through a process that allows people whose lives are affected by such decisions to have a say in the decision-making process.[288]The *amicus curiae* participation therefore offers a 'deliberative forum' for engagement between the judicial decision-makers and the recipients of such decisions.[289] Supranational adjudicatory bodies cannot decide public interest cases in complete detachment from the polity, and overlook the values, traditions and beliefs shared by their audiences.[290]

Claims of traditions, cultures, values and diversity place an emphasis on the need for discursive voices and multiple platforms of engagement. However, most of the NGOs filing *amicus* briefs in the African human rights system are based outside Africa, and therefore, their sociological legitimatory potential is limited. It is argued that increased participation by NGOs based in Africa would increase democratic participation in the African human rights adjudication processes. Finally, it is important to note that this study does not take *amicus* intervention as a sole response to the legitimation of international law, but maintains that it is a vital one.

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[287] Ibid.
[288] M Amos 'The value of the European Court of Human Rights to the United Kingdom' (2017) 28/3 *European Journal of International Law* 767.
[289] F Viljoen & A Abebe 'The participation of amicus curiae before regional human rights bodies in Africa' (2014) 58/1 *Journal of African Law* 26. See also, D Feldman 'Public interest litigation and constitutional theory comparative perspective (1992) 55/1 *Modern Law Review* 44 – 72.
[290] Bürli (n 194 above) 30.

CHAPTER 7

CONCLUSION AND RECOMMENDATIONS

Civil society is an essential actor in the African human rights movement, and without its contribution the entire African human rights architecture may collapse into nothingness. Today, the involvement of NGOs and other organisations in the litigation of the interpretive organs of the African human rights system has become more important than ever. This is not only because they continue to bring claims *proprio motu* and also act as representatives of victims, but also because they participate before these bodies as *amici curiae*. It has been said that judicial decisions with constitutional salience 'represent the struggle of interest groups to etch their broader policy views into law.'[1]

While NGOs are deservingly credited for having played an active role in the development and sustenance of the African human rights system, their role may be enormously enhanced by the greater participation of *amici curiae* before the continental supranational judicial and quasi-judicial mechanisms.[2] The present study considers and systematises the developing *amicus* procedures and practices of the African judicial and quasi-judicial bodies and develops comprehensive and systematic *amicus* theories rooted in the relevant African human rights jurisprudence. It also makes suggestions on how *amicus* participation may be made effective in the African system.

The study notes that international litigation is formatted in adversarialism or bilateralism in line with the common law or Anglo-philosophical thinking in terms of which 'two competing legal interests are pitted against each other with a judge charged with deciding in accordance with existing law which of the two should prevail.'[3] The bilateral litigation arrangement or model pays little regard to the role and significance of non-parties, in that it places enormous emphasis on self-interest through the importance it attaches to individual initiative, and through the weight it places on the

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[1] L Epstein 'Interest group litigation during the Rehnquist Court era' (1993) 9/4 *Journal of Law and Politics* 652.

[2] F Viljoen & A Abebe 'The participation of *amicus curiae* before regional human rights bodies in Africa' (2014) 58/1 *Journal of African Law* 40.

[3] S Shah *et al* 'Rights, interveners and the Law Lords' (2014) 34/2 *Oxford Journal of Legal Studies* 296. See also A Chayes 'The role of the judge in public law litigation' (1976) 89/7 *Harvard Law Review* 1282–83, for a description of the 'traditional conception of adjudication'.

role of the record parties in a legal proceeding. [4] These factors constitute a barrier to the participation of groups and individuals wishing to contribute to public interest cases as *amici curiae*.

However, we are beginning to experience a remarkable shift in international law from the traditional bipolar and adversarial litigation akin to the common law legal process, to something more fluid and flexible, less formal, less atomistic and less individualistic in character. There is a growing recognition that international human rights disputes are polycentric in nature, and 'polycentricity force[s] … consideration of the problem in its broadest possible form.'[5] Decisions on such disputes also have *erga omnes* effects, i.e, the have effects that go beyond the facts of a particular case within the domestic legal order of the respondent state and extend to the broad swath of the region.

In this sense, granting individuals, NGOs and groups the opportunity to intervene before the African regional human rights adjudicatory bodies must be seen as a recognition of the fact that despite their limited res *judicata effect*, any decision of an international judicial body in the modern international legal system could still bear a *de facto* influence on the position of non-parties to the suit.[6] Thus, groups representing public interest must be allowed to submit alternative views to human rights adjudicatory bodies. The argument being made is that an adversarial model of litigation unduly constrains the elucidation of third party interests and is ill-suited for human rights claims. It is argued that the admission of *amici curiae* is the most important way of tempering the rigours of bilateralism in international litigation. Central to the admission process is a comprehensive set of rules.

7.2 The rules governing *amicus* participation

Each of the three supervisory organs of the African system discussed in this study has adopted rules of procedure containing provisions dealing with *amicus* participation in their proceedings. These rules have a fair share of their strengths and weaknesses. Regarding their strengths, they have limited procedural restrictions. For instance, they do not require NGOs to be accredited with the AU or to be registered in one of its

[4] C Harlow 'Public law and popular justice' (2002) 65/1 *Modern Law Review* 1.
[5] RG Bone 'Lon Fuller's theory of adjudication and the false dichotomy between dispute resolution and public law models of litigation' (1995) 75/5 *Boston University Law Review* 1317.
[6] A Zimmermann 'International courts and tribunals, intervention in proceedings' (2006) *Max Planck Encyclopaedia of International Law* 4.

member states to appear before any of the African human rights supervisory bodies. This is contrary to the position before the Inter-American Court in terms of which only NGOs recognised under the laws of one or more members of the OAS are granted audience as friends of the court. In addition, the rules for the African mechanisms under analysis do not limit these bodies to accept *amicus* briefs from well-known organisations only, which frequently prepare fine-grained and well-argued briefs, but also permit them to accept submissions from less known and inexperienced litigators.[7]

Of course, well known and experienced NGOs are preferred but small and emerging ones are not excluded from participation. Once briefs are filed, equal attention is given to their contents. This is in contradistinction to the practice in the US where justices and clerks of the Supreme Court give more attention to *amicus* submissions filed by well-established groups known for quality briefs.[8] Further, oral submissions by *amici curiae* are permitted in the hearing of the proceedings by each body. This is unlike in the European and Inter-American systems, where friends of the court are rarely allowed to participate in the oral phase of the case. Finally, in the African system *amici curiae* are allowed to file both factual and legal perspectives.

However, the study also concludes that the rules of procedure of the supervisory organs of the African human rights system are too broadly outlined, woefully under-specified, are incomprehensible, and are incapable of creating effective regulatory *amicus curiae* regimes. The benefit being derived from such scanty rules is that the adjudicatory tribunals are left with the flexibility and discretion to bridge existing gaps by devising creative ways of managing the participation of *amici curiae* in their proceedings. The flexibility of rules of procedure is therefore an important quality, making it possible to deal with many unprecedented and unforeseen circumstances and unpredicted legal issues arising in a case.

The converse of the equation is that the lack of proper and adequate regulation may present a difficulty to potential *amici curiae*. For instance, the present procedural guidelines for African regional human rights judicial and quasi-judicial bodies do not specify the conditions and criteria for intervention, leaving the situation uncertain,

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[7] Compare, N Bürli *Third party interventions before the European Court of Human Rights* (2017) 115.
[8] KJ Lynch 'Best friends? Supreme Court Law Clerks on effective *amicus curiae* briefs' (2004) 20/1 *Journal of Law & Politics* 46-56.

opaque and unpredictable. There is therefore a need to upgrade and strengthen the *amicus* regulatory frameworks of the concerned bodies in this regard by giving structure to their system of procedural law i.e by developing comprehensive guideline procedures for handling *amicus* briefs.

The question of the participation of individuals and NGOs in international litigation requires a delicate balancing exercise between two competing interests. First, it is important to ensure that those issues that can properly be ventilated or dealt with by civil society have an avenue for presentation before an international court or tribunal. Second, it is critical to curb the risks that unregulated or uncontrolled civil society participation may constitute for the rights of the existing parties to a dispute.[9] The importance of these competing interests and the difficulties inherent in finding a proper balance between them call for a comprehensive regulation of the participation of civil society in litigation.[10] It therefore appears that a formalised legal status for NGOs and other organised interests in international litigation seems unavoidable in order to deal with the tension between the competing interests at stake.[11]

Ultimately, regulation will ensure that the overarching purpose of the courts and tribunals, namely the facilitation of a just, timely, cost-effective and efficient resolution of disputes between the parties, is not undermined or compromised. There can hardly be any divergence of opinion in the assertion that international courts and tribunals are better placed to deliver justice in the most efficient manner practically possible with tailored procedural frameworks. Zengerling correctly recommends that the African regional human rights judicial and quasi-judicial bodies 'should consider explicitly regulating *amici curiae* participation in their rules of procedure, following the 2009 example of the Inter-American Court, and therefore clearly recognising their status and their role in the proceedings.'[12] This is important in ensuring effective *amicus* participation before the interpretive organs under analysis.

Although it is not expected that any serious international tribunal may lack the power to accept *amicus* briefs in this era, it is proposed that the *amicus* procedure should be

[9] L Vierucci 'NGOs before international courts and tribunals' in P-M Dupuy & L Vierucci (eds) *NGOs in international law: efficiency in flexibility?* (2008)169.
[10] Ibid.
[11] Ibid.
[12] C Zengerling *Greening International jurisprudence: environmental NGOs before international courts, tribunals, and compliance committees* (2013) 124.

explicitly codified in the relevant governing Rules of Procedure of the concerned body to create certainty and predictability on the part of potential intervenors about the authority of the tribunal to accept *amicus* briefs. In order to facilitate the greater use of the *amicus* procedure, the possibility of entertaining these entities must be recognised explicitly 'in an easily accessible form, allowing for transparency and predictability.'[13] While the African Commission and the African Children's Rights Committee have made efforts to clarify their *amicus* procedures, the African Court has not done so. It is proposed that the African Court should emulate its counterparts in the African system and amend its Rules of Procedure to expressly allow for *amicus* participation and specify applicable conditions.

The African Court's Practice Directions go some appreciable length towards providing clarity about the Court's *amicus* procedures. However, there is a need that this procedure be entrenched in the Court's Rules of Procedure in a more formal way as opposed to bits and pieces of the procedure being scattered in disparate documents, as is currently the case.[14] This incoherence makes the Court's *amicus* procedure chaotic and inaccessible. It must also be noted that while other tribunals, such as the European Court, make reference to the rather open-ended and confusing term: 'third party intervention', which inarguably encapsulates the *amicus curiae* procedure in some contexts, it is proposed that the African Court should explicitly use the term: '*amicus curiae*' in its Rules of Procedure as is the case in the Rules of Procedure of the African Commission and the African Children's Rights Committee. This would foster certainty for putative friends of the court in the African human rights system.

In addition, it is proposed that the relevant Rules of Procedure of the African regional human rights enforcement mechanisms should specifically address questions about *ratione personae, ratione materiae* and *ratione temporis* of *amicus* participation. With respect to *ratione personae*, the relevant rules must expressly specify that not only individuals and NGOs, but all groups or entities with interest in a case may be admitted as *amici curiae*, including NHRIs and other entities. In other words, access to the supervisory organs of the African system must not be limited to individuals and groups but must also include NHRIs. Like local NGOs, NHRIs possess intimate knowledge about the socio-economic, political and legal contexts of countries amassed over a

[13] Viljoen & Abebe (n 2 above) 41.
[14] Ibid.

sustained period of time. They are therefore eminently suited to offer expert opinions to African tribunals in that regard.

For *ratione materiae* purposes, the Rules must specify the general objective that the brief is intended to serve. In this regard, it is proposed that the relevant instruments of the African mechanisms under review should codify the novelty requirement. Generally, to have the desired impact on legal thought, *amici curiae* must file briefs that contain novel or distinctive arguments and not merely rehash arguments made by the record parties. In an era of growing caseloads before African regional human rights tribunals, as well as public impatience with inordinate delays and high expenses in litigation, these bodies must be diligent to bar the gates to briefs that amount to no more than a re-argumentation of the case.

An *amicus* brief that merely echoes the submissions of the primary parties unduly burdens the Court and must be rejected. As stated by the South African Constitutional Court stated in *Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others*:[15]

> The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court. The *amicus* must not repeat arguments already made but must raise new contentions ...[16]

As regards *ratione temporis*, the Rules of Procedure of the African adjudicatory bodies must specify the timelines that filers of *amicus* briefs must observe. Drawing on the experience of the European Court and the Inter-American Court, they must fix the timeline within which an *amicus* application must be filed following the filing of a case. The Rules must also establish the timeframe within which the actual intervention or brief has to be filed as is the case with the European and Inter-American Courts.

Although the African Court is silent on when an application for *amicus* intervention must be launched, it has developed a rule of practice in terms of which an actual brief must be lodged within thirty days from the date of the order authorising the admission of the *amicus* intervenor in the proceedings. Temporal prescriptions are also

[15] SA 2002 (5) 713.
[16] Ibid.para 5.

necessary to ensure that *amici curiae* do not delay the proceedings. This underscores the importance of facilitating access to case information ahead of the preparation and filing of an *amicus* brief.

Moreover, to avoid potential overlaps of submissions between concurrent *amicus curiae*, it is important that procedural rules should contain a requirement that, where possible, potential *amici curiae* should coordinate their efforts and file joint or consensus submissions that comply in the furthest extent possible with the novelty requirements. The question relating to the length of *amicus* briefs must be left to the discretion of concerned individual tribunals, to be decided with reference to the complexity or otherwise of the case. The tribunals may also fix page limits for briefs on their Rules of Procedure. They must reserve for themselves the right to increase the length of such briefs in appropriate cases to ensure that important details or aspects of the case are not sacrificed or dealt with perfunctorily on the altar of brevity. The argument being made is that brevity must not undermine or trump the objective of helpfulness.

It is also submitted that the theoretical possibility of filing *amicus* submissions must be accompanied by procedural measures ensuring that *amici* have access to case information on which a decision to intervene or otherwise may be based. The petitioner's 'right' to file a brief and the petitioner's 'right' to access the pleadings of the primary parties go together. The experience, thus far, is that applications to intervene as a friend of the court are heavily reliant on informal or unofficial channels of communication and therefore unfairly favour the well-connected and well-resourced organisations.[17] This practice should be discouraged. To equalise opportunity for potential *amicus* intervenors, case information must be placed on the websites of the bodies concerned.

The study also notes that the fact that the litigation before the African Commission and the African Children's Rights Committee unfold in a secretive environment makes the *amicus* opportunity before these bodies virtually illusory. This is because the confidentiality controls of these bodies prevent the sharing of case information with the public. Without access to the parties' pleadings, it is difficult for *amici curiae* to file to-the-point submissions. There has been trenchant criticism that lack of access to the

[17] Viljoen & Abebe (n 2 above) 42.

case file by *amici curiae* is likely to limit or undermine the effectiveness of *amicus* submissions.[18] Ensuring access by *amici curiae* to case files will also ensure that their submissions are not duplicative.

It is only after having studied the pleadings by the record parties that *amici curiae* may identify their own points of entry at the case. It must be noted that the African Commission already furnishes a list of cases that it is seized with in its Activity Report. Providing some further information concerning the nature of the communication as well as the specific rights alleged to have been violated in summary form may go a long towards encouraging *amici curiae* to file observations.[19] This would not fall foul of this body's confidentiality controls.[20] The summarised information could be published in the Commission's Activity Report, which is considered and authorised by the Assembly of Heads of State and Government, thereby bypassing the confidentiality restrictions.[21]

In an effort to bypass access controls, the ICSID tribunals have authorised *amici curiae* to have access to those case documents that are necessary to enable them to focus their submissions upon the issues in a dispute. This allows the intervenors to have knowledge of the positions taken by the respective record parties on those issues beforehand.[22] Some arbitration tribunals have issued press statements on case information including deadlines for *amicus* submissions.[23] Finally, it remains to propose that each mechanism under analysis must develop its own rules suited to its own context. The permissiveness or otherwise of the rules will determine the extent to which *amici curiae* will be able to intervene in the proceedings of the African judicial and quasi-judicial bodies and assist them in the creation, development and application of human rights law.

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[18] J Harrison 'Human rights arguments in *amicus curiae* submissions: promoting social justice? in P-M Dupuy *et al* (eds) *Human rights in international investment law and arbitration* (2009) 406; J VanDuzer 'Enhancing the procedural legitimacy of investor-state arbitration through transparency and *amicus curiae* participation' (2007) 52/4 *McGill Law Journal* 715; K Tienharra 'Third party participation in investment- environment disputes: recent developments' (2007) 16/2 *Review of European Community and International Environmental Law* 242 & 232.

[19] R Murray & O Jonas *Opinion to the African Commission:* '*Amicus* before the African Commission: proposals for addressing the challenges of confidentiality' (2018) 7 (on file with author).

[20] Ibid.

[21] Ibid.

[22] *Piero Foresti, Laura de Carli and Others v South Africa*, ICSID Case no. ARB (AF)/07/1, Award of 4 August 2010, para 28.

[23] E.g. *Pac Rim Cayman v El Salvador*, ICSID Case no. ARB/09/12, Award of 14 October 2016.

7.3 The role of *amicus* in judicial analysis

There is a broad consensus among officials of the African Commission, the African Court and the African Children's Rights Committee that *amici curiae* have the unique potential to assist these bodies with specific social science data and legal perspectives in the resolution of disputes and also engage in progressive jurisprudential entrepreneurship. Such proffered assistance would help these mechanisms to resolve cases more creatively and with greater insight. This is because through *amicus* interventions, African regional human rights judicial and quasi-judicial bodies would be exposed to appropriate human rights principles, doctrines and precedents to call in aid in the disposition of cases, and declare rules and norms of Africa-wide applicability. *Amici curiae* could offer these bodies new approaches and perspectives that could cast a legal dispute in a different and more tractable light.

It is noteworthy that as the youngest, the African regional human rights system has the benefit of the history of other systems to rely on, such as the European and Inter-American systems. These systems have for a long time relied on perspectives, viewpoints and ideas of *amici curiae* to found conclusions of law and fact. Commenting on the extensive involvement of *amici curiae* in the European and Inter-American systems, Mohamed correctly observes that:

> Individuals and human rights NGOs in Europe and the Americas have exploited the concept of the *amicus curiae* as a mechanism for participating in and shaping the course of human rights adjudication before the European Court of Human Rights and the Inter-American Court of Human Rights.[24]

This author further notes that both the European and the Inter-American Courts have leveraged the plenary opinions offered by *amici curiae* in deciding complex cases brought before them, thus leading to well-researched decisions that have attracted the respect of the international legal community.[25] Similarly, *amicus* briefs may go some

[24] AA Mohamed 'Individual and NGO participation in human rights litigation before the African Court of Human and Peoples' Rights: lessons from the European and inter-American courts of human rights' (1999) 43/2 *Journal of African Law* 205. See also A Wilkowska-Landowska 'Friends of the court: the role of human rights non-governmental organisations in the litigation proceedings' (2006) 2 *Human Rights Law Commentary* 113.

[25] R Blackburn 'Current developments, assessment and prospects' in R Blackburn & J Polakiewicz (eds) *Fundamental rights in Europe: the European Convention on Human Rights and its member states* 1950-2000 (2001) 83.

appreciable distance towards strengthening the sometimes faltering, deficient or slipshod reasoning of the African human rights adjudicatory bodies.

In the context of the European Court, it has been said that NGOs can invest resources in high-quality investigative and analytic research that assist this body with perspectives and sources that enable it to write well-reasoned judgments.[26] The epistemic quality of a tribunal's decisions is important to its success. This is because the power of a tribunal resides in its ability to persuade.[27] International courts and tribunals, lacking their own or automatic law enforcement apparatuses, rely on their sheer power of legal suasion and the coherence of their legal doctrine to ensure compliance with their decisions. Human rights audiences are persuaded rather than coerced to accept the authority of interpretation formulated by a treaty supervisory body.[28]

Murray and Long state that '[a] well-written, precise, clear finding [or decision] that has emerged from a systematic, thorough process that has considered a range of facts can carry considerable legal as well as political force.'[29] Research on supranational adjudication in Europe attributes the success of the European Court to its adept use of 'the language of reasoned interpretation, logical deduction, systemic and temporal coherence.'[30] It is also said that these qualities create a 'compliance pull'[31] for decisions of this body within the European Council, in particular, before national judges.[32]

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[26] S Dothan 'Luring NGOs to International Courts: a comment on CLR v. Romania' (2015) 75/3 *Zeitschrift fuer Auslaendisches Oeffentliches Recht und Voelkerrecht* 645.
[27] K Roach 'Remedies for laws that violate human rights' in J Bell (ed.) *Public law adjudication in common law systems: process and substance* (2014) 289. See also A Bianchi International adjudication, rhetoric and storytelling' (2017) 9/1 *Journal of International Dispute Settlement* 28.
[28] ST Ebobrah 'Reinforcing the identity of the African Children's Rights Committee: a case for limiting the lust for judicial powers in quasi-judicial Human rights mechanisms' (2015) 2/1 The *Transnational Human Rights Review* 23.
[29] R Murray & D Long *The implementation of findings of the African Commission on Human and Peoples Rights* (2015) 7.
[30] JHH Weiler 'A quiet revolution: the European Court of Justice and its interlocutors' (1994) 26/4 *Comparative Political Studies* 521. See also LR Helfer & A-M Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107/2 *Yale Law Journal* 318–23.
[31] TM Franck *The Power of Legitimacy Among Nations* (1990) 24.
[32] A-M Burley & W Mattli 'Europe before the Court: a political theory of legal integration' (1993) 47/1 *International Organization* 41.

The present study has also established that there is a general feeling among the members of the three African human rights interpretive organs that *amicus* intervention before these bodies bears the potential to enrich judicial analysis by providing background and unrepresented or underrepresented relevant information. This would enable these mechanisms to make decisions that are fully informed about the wider social and political implications of the issues at stake. In addition, members of the bodies under analysis also believe that *amicus* participation would potentially influence the success of litigation. This is principally because *amici curiae* offer additional information that buttresses the submissions of the record parties, thereby enhancing the overall persuasiveness of a particular side of the case.

However, these mechanisms insist that an *amicus* intervenor must remain neutral in order to attract credibility to its submissions. As a device of persuasive juridical argumentation, it is expected that *amicus* briefs would assist the members of African interpretive bodies, as the ultimate and authoritative legal decision-makers, towards affirming the 'correct' policy outcomes. Further, officials of the African supervisory organs as well as NGO personnel believe that *amici curiae* may sometimes present legal submissions or factual perspective strategically or inadvertently omitted or considered irrelevant or unhelpful by the record parties.

These would help to place the dispute in a panoramic context so that the tribunal might have a full picture of the dispute and come to an accurate conclusion. In this way, such submissions might broaden the scope of the judicial analysis by drawing the attention of a tribunal to an issue which is not of immediate concern to the record parties, but germane to the resolution of the dispute. Because *amicus* submissions provide new and original insights in judicial deliberation, they are particularly vital when tribunals resolve controversial and novel cases. Thus, they impact on the development of international human rights law.

In addition, given the *ad hoc* nature of the African human rights judicial and quasi-judicial bodies, and the human resource constraints that they experience, allowing civil groups to participate in their proceedings could potentially overcome some of the difficulties of their having to undertake time-consuming and expensive research. The research would help in advancing certain exegeses or canons of interpretation, and therefore broaden the normative context of interpreting the African Charter and other

related African human rights instruments. This would ensure that these classical instruments are always on the cutting edge of legal policy and that they remain progressive, never ossified, never outdated or archaic. As Bruch notes, 'the concept of human rights, like all vibrant visions, is not static or the property of any one group; rather, its meaning expands as people re-conceive of their needs and hopes in relation to it.'[33] In this spirit, our understanding of the rights affirmed in the African Charter and other African human rights statutes is similarly subject to continual change.

The African judicial and quasi-judicial bodies appear to be reacting positively to the persuasive attempts of their friends. For instance, the African Commission extensively relied on submissions filed by the *amicus* intervenor to buttress the complainant's submissions in *Centre for Minority Rights Development & Anor v Kenya* (the *Endorois* case)[34] to assertively develop its jurisprudence on the land rights of indigenous communities in Africa. The opinion of the Commission in this case is practically identical to the submissions of the *amicus curiae* even as to the use of language and the authorities cited. The Commission also found the submissions by *amici curiae* to be helpful in *Gabriel Shumba v Zimbabwe*.[35] It relied on the *amicus* brief on the elucidation of the doctrine of the constructive exhaustion of local remedies. However, in *Kenneth Good v The Republic of Botswana*,[36] it found the *amicus* submission duplicative and unhelpful.

The African Court is also finding *amicus* briefs increasingly helpful. For instance, In *APDH v The Republic of Côte D'Ivoire* (the *APDH* case),[37] it used the conceptual legal and structural formulation that was devised by an *amicus* intervenor to hold that the African Charter on Democracy and elections is a human rights instrument. The Court also relied on international and comparative legal materials supplied to it by the *amicus curiae* to support its opinion in this regard. In *Lohé Issa Konaté v Burkina Faso* (the

[33] C Bunch 'Women's rights as human rights: toward a re-vision of human rights' (1990) 12 *Human Rights Quarterly* 487. See also M Mutua *Human rights standards: hegemony, law and politics* (2016) 2.
[34] Communication no. 276/2003, para 46.
[35] Communication no. 288/04, para. The brief was submitted on behalf of Clinical Advocacy Project, Human Rights Program of Harvard University by the Institute for Human Rights and Development in Africa.
[36] Communication no. 313/05, para 17.
[37] Application no. 001/2014, Judgment of 18 November 2016.

Konaté case),[38] the Court relied on submissions by *amici curiae* to rule that the imposition of severe custodial sentences was not proportionate to the legitimate interest of protecting the reputations of public officials.

In *Ingabire Victoire Umuhoza v Rwanda*,[39] although the African Court rejected the argument by the petitioner and *amicus curiae* that it was impermissible for a state to withdraw from its jurisdiction, it relied on the alternative submissions by the *amicus curiae* to hold that the right to withdraw is not unqualified. In particular, it upheld the argument by the *amicus curiae* that in withdrawing from the Court's jurisdiction, a state must give a 12 month notice and that such withdrawal shall not have implications for cases pending before the Court. It emphasised the point that such notice is necessary to guarantee the juridical security of the African human rights by avoiding to abruptly abrogate its protection measures without reference to the rights holders.

However, in the *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* (the *SERAP Advisory Opinion*),[40] the African Court rejected an argument by the applicant and *amici curiae* that an NGO has the capacity to request an advisory opinion from it. Similarly, in the Advisory Opinion on the *Standing of the African Committee of Experts on the Rights and Welfare of the Child before the African Court on Human and Peoples' Rights*,[41] the Court rejected submissions by *amici curiae* that the African Children's Committee was, like the African Commission, entitled to refer cases to it for a binding decision, and held otherwise.

The African Children's Committee merely summarised the submissions of the *amicus* intervenor in the *Minority Rights Group International and SOS-Esclaves* case without citing them at the evaluative part of the decision. On the contrary, the EACJ has explicitly upheld the submissions by *amici curiae*,[42] and has even commended that *amicus* intervenors 'very ably and conscientiously assisted the Court without any attempt to side with any other party in the reference. The Court, as a friend of the *amicus curiae*, was guided accordingly.'[43]

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[38] Application no. 04/2013, Judgment of 5 December 2014.
[39] Application no. 3/2014, Order of 3 June 2016.
[40] Application no. 001/2013, Judgment of 26 May 2017.
[41] Application no 002/2013, Judgment of 5 December 2014.
[42] *Attorney General of Kenya v Independent Medical Legal Unit*, Appeal no. 01 of 2011, 12, Judgment of 5 March 2012.
[43] *Calist Mwatela & Others v East African Community*, Application no. 1 of 2005, 24, Judgment of October 2006.

It may be argued that the fact that a tribunal summarised the *amicus* submission(s) may mean that it considered them to be helpful, especially where the tribunal used the same interpretive methodologies and analytical approaches and came to the same conclusion as the intervenor(s). In some cases, it might be that the tribunal reacts to the *amicus* submissions implicitly as it deals with the submissions by the petitioner, which are often materially comparable to those of the intervenor(s).[44]

Overall, although the role of the *amicus curiae* in the African human rights system remains modest, present efforts by civil society to intervene before this system bode well for further development and the enhanced utility of this device on the continent. It is also hypothesised that an increased citation of *amicus* submissions will lead to an increase in the filing rate of briefs. The argument that civil society will react to citation-inspired signals of demand from a court correlates with conclusions from studies conducted in the US.[45] With enhanced participation, *amici curiae* stand a greater chance of influencing the legal policy on the African continent.

However, *amicus* intervenors will need to prepare well-researched, lucidly-written and accessible briefs to have the desired impact in judicial analysis. They must be simple and unadorned by rhetorical flourish and free from purple prose or ornate language. To be sure, clarity is essential in legal argumentation: 'brief clarity promotes opinion clarity.'[46] Cognitively intelligible *amicus* submissions are more persuasive because they better allow the court to establish the precise reasoning and analysis advanced in the brief.[47] In addition, closely argued briefs demonstrate the knowledge and ingenious industry or ability of the *amicus* intervenor to engage in legal analysis 'in a clear, logical, step-by-step way, such that the reader sees how the writer reached his or her conclusions and, ideally, agrees with them.'[48]

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[44] Compare LR Glas 'State Third-party interventions before the European Court of Human Rights: the 'what' and 'how' of intervening' (2016) 5/1 *European Journal of Human Rights* 555.
[45] For instance, see TG Hansford & K Johnson 'The supply of *amicus curiae* briefs in the market for information at the U.S. Supreme Court' (2014) 35/4 *Justice System Journal* 366.
[46] PM Collins Jr *et al* 'The influence of *amicus curiae* briefs on U.S. Supreme Court opinion content' (2015) 49/4 *Law & Society Review* 923.
[47]Ibid.; RJ Owens & JP Wedeking 'Justices and legal clarity: analyzing the complexity of U.S. Supreme Court opinions (2011) 45/4 *Law & Society Review* 1027-1061; RJ Owens & PC Wohlfarth 'How the Supreme Court alters opinion language to evade congressional review' (2013) 1/1 *Journal of Law and Courts* 35-59.
[48] JA Baker 'And the winner is: how principles of cognitive science resolve the plain language debate' (2012) 80/2 *University of Missouri-Kansas City Law Review* 302.

It has also been said that courts may incorporate the language of well-written *amicus* briefs as a way of making efficient or optimal use of their energy and time.[49] In that way, civil society might subsidise the tribunals' opinion writing while at the same time contributing towards their jurisprudential legacy.[50] It is expected that the African judicial and quasi-judicial bodies will adopt the reasoning and also incorporate more insights from cognitively lucid submissions by third parties. A similar hypothesis has been made in the context of the US Supreme Court:

> We posit that the justices will latch onto language in *amicus* briefs that are written in plain English since those briefs are likely to be viewed as more compelling than excessively verbose briefs. Thus, we hypothesize that the justices will incorporate more language from *amicus* briefs that rely on plain language.[51]

It must also be recalled that a member of the African Commission, African Court and African Children's Committee is not permitted to sit in a case against his or her state of nationality. The admittance of perspectives of local *amicus* groups to be heard would be a means by which these bodies may be afforded some expertise on the domestic legal processes and practices within the respondent state which could have been provided by the disqualified Commissioner, Judge or Committee member. This might help reflect the real material conditions of society and enhance the on-the-ground impact of the anticipated rulings.

The point being canvassed is particularly important when it is recalled that the ideology of the African human rights system is embedded in shared African values traditions and cultures. The African Charter also emphasises that its ambition is to 'achieve a better life for the people of Africa.'[52] In addition, as the agenda for the African renaissance of the twenty first century is framed within the self-proclaimed philosophy of African solutions to African problems, it is critically important that regional judicial and quasi-judicial bodies develop a homegrown jurisprudence that is informed by African perspectives.

In the context of the African Court, the *amicus* procedure may also be seen as a facet of class action in terms of which NGOs may present before the Court the interests of

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[49] P Corley ***et al*** 'Lower court influence on U.S. supreme court opinion Content' (2011) 73/1 *Journal of Politics* 31.
[50] Collins (n 46 above) 922.
[51] Ibid. 924.
[52] See the Preamble of the African Charter.

populations in countries that have not made the declaration under article 34(6) accepting the jurisdiction of the Court in respect of claims brought by individuals and NGOs. This will enable the Court to make decisions confident of their social implications in the region. It has been established that the instrumentality of *amici curiae* in the African system is not limited to its informational role but also extends to its democratic legitimation function, at least potentially.

7.4 Democratic legitimation

The case docket of African regional human rights interpretive mechanisms is rising as claims alleging diverse violations of the human rights statutes of the AU are brought before these bodies. As a consequence, human rights cases in Africa are increasingly escaping from domestic to regional regulation. In what Donoho refers to as 'democratic displacement', international judicial decision-making leads to losses in democratic self-rule, as decisions of increasingly authoritative and assertive international judicial and quasi-judicial bodies displace the popular preferences and interests of domestic publics.[53] It must be noted the African human rights interpretive organs not only provide redress for victims of human rights violations but also increasingly render constitutional justice by deciding highly contentious or controversial social and political human rights claims as well as moral issues that lie at the core of democratic rule.

The decisions rendered by these bodies permeate the internal domains of states, altering domestic legal rules and practices in the process. In other words, decisions of these bodies increasingly have implications for policy choices previously considered to be exclusively within the domestic realm of states. Admittedly, the result has been democratic legitimacy deficit of this system. The present study uses the democratic theory to argue that *amici curiae* can be generally useful in helping to overcome the democratic legitimacy of the African human rights system. This is because the *amicus* device feeds the opinions and thoughts of polities into the transnational judicial decision-making sphere.

Further, the present study argues that the opacity of the complaints procedures of the African Commission and the African Children's Rights Committee contributes to the democratic legitimacy problems that haunt the African regional human rights judiciary.

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[53] DL Donoho 'Democratic legitimacy in human rights: the future of international decision-making' (2003) 21/1 *Wisconsin International Law Journal* 16.

To this end, the *amicus* device is conceived as a tool for democratic input into an otherwise politically insular and socially detached dispute settlement system. The central argument in this connection is that given its participatory elements and representative character, the *amicus curiae* represents one of the more promising ways to overcome the democratic legitimacy deficit that is haunting the African judicial and quasi-judicial bodies.

Democratic theorists have argued for citizen participation in the formulation of laws and policies that affect them. This is tied to the concept 'democratic inclusion,' through which Marks contends that every individual has a right to put across their views in a decision-making process that has an impact on their lives.[54] Some writers have pointed out that NGOs, who are the main briefers before international courts, facilitate more intimate and direct citizen participation.[55] These entities create direct and functional links of engagement between the people and international courts and tribunals. Central to this logic is the thinking that civil society represents the global polity and its participation in the deliberative processes of multilateral fora overcomes the democratic-legitimacy deficit haunting the multilateral system.

It can be deduced from the foregoing reasoning that *amici curiae* pursue a similar function. Indeed, the legitimatory role of *amici curiae* is encouraged in the transnational arena since here there are no popular and democratic bodies like parliament, which are the primary enforcers of public interest in the domestic legal order. It has been argued that 'individuals are extremely handicapped in international law from the procedural point of view'.[56] By focusing on the interests and rights of individuals, as opposed to those of states, influential NGOs certainly deserve credit for also assisting in humanising modern international law.[57]

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[54] S Marks *The riddle of all constitutions* (2000) 119.

[55] M Bexell *et al* 'Democracy in global governance: the promises and pitfalls of transnational actors' (2010) 16/1 *Global Governance* 82. See also J Atik Identifying antidemocratic outcomes: authenticity, self-sacrifice and international trade (1998) 19/2 *University of Pennsylvania Journal of International Economic Law* 229.
K Jayakar Globalization and the legitimacy of international telecommunications standard-setting organizations (1998) 5/2 *Global Legal Studies Journal* 711; JV Antonov 'Legal instruments of e-democracy for the development of civil society in international practice' (2014) 5 *Czech Yearbook of International Law* 19.

[56] R Higgins 'Conceptual thinking about the individual in international law' (1979) 4/1 *Review of International Studies* 11.

[57] S Charnovitz 'Nongovernmental Organizations and International Law' (2006) 100/2 *American Journal of International Law* 360 – 361.

In terms of this humanistic thinking, participatory procedures do not replace the conventional democratic legitimacy chain but constitute a vital complement to it. To this end, *amicus* participation represents the prime form of democratic input into the African human rights judiciary. It is an illustration of the process of collective decision-making which is essential in a democracy. It also underlines the fact that the enforcement of human rights is a collective effort, which necessarily calls for active civic engagement to shape a collective life.

Underlying the democratic theory is the idea that inclusive participation is vital to international judicial decision making in that it responds to and overcomes some of its functional deficits. The argument being maintained is that international dispute settlement regimes draw their legitimacy from the deliberative quality of their decision-making processes, which *amici curiae* enhances. The democratic theory emphasises the need for the creation of a transnational sphere or communicative space to foster the exchange of viewpoints and arguments so that people may have ideational conversations about their common destiny.

It has also been contended that courts with a constitutional or quasi-constitutional function need to represent the views of the people as does parliament.[58] In contrast to representation in an elective plenary body such as parliament, however, representation in courts is purely argumentative.[59] At the centre of this approach is the discourse principle, which requires that decisions must be made through a process that is integrative and inclusive of all potentially affected persons.[60] Habermas reminds us that:

> Neither moral nor legal values emerge from some normative metaphysical or universal source: law, whether international or customary, is a social construction attainable through debate, persuasion and inclusive legal discourse involving the participation of everyone concerned'.[61]

However, concerns have been raised that NGOs are themselves unrepresentative, lack pluralistic participation and therefore cannot possibly remedy the democratic

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[58] R Alexy 'Balancing, constitutional review and representation' (2005) 3/4 *International Journal of Constitutional Law* 578-579.
[59] Ibid. 579.
[60] L Crema 'Testing *amici curiae* in international law: rules and practice' (2012) 22/1 *Italian Yearbook of International Law* 95.
[61] J Habermas *Between facts and norms: contributions to a discourse theory on law and democracy* (1998) 222.

legitimacy gaps in the international legal order when they suffer the same problem. On the contrary, it is submitted that if tribunals are seen as participatory and responsive, they can stake a claim to democratic legitimacy based not on the vote or representativeness but on popular participation.[62]

It is also important to note that so far, most of the *amicus* intervenors before the African system have been foreign-based NGOs. For instance, it is said that an 'engagement with the African Commission has been dominated by international NGOs and a handful of African-based organisations, those who have the capacity and resources to attend the sessions of the Commission and the ability to develop a relationship with it over a sustained period of time.'[63] This is the case across all African regional human rights courts and tribunals. The domination of these sites by non-African NGOs raises doubts about the legitimatory potential of *amici curiae* in this system, since outsider actors cannot genuinely represent the interests of African publics. It is therefore necessary that African-based civil society organisations should be at the forefront in interacting with the African human rights judiciary to supply it with the much-needed democratic legitimacy.

7.5 Final remarks

It is a truism that civil society has been the lifeblood of the African human rights system. It is submitted that its role and significance may be further enhanced by its greater involvement as a friend of the court. Overall, as an instrument of argumentation, the *amicus curiae* would improve the quality of litigation by 'increasing the availability of argument, interpretation, and application of norms and enhancing the value of judicial decisions as a source of human rights law.'[64] However, it is important to note that the impact of *amici curiae* in litigation may not be instant. Their contribution is often modest but incremental. They take measured steps rather than quantum strides.

However, their litigation work can have massive cumulative effects in the long term, structurally transforming the African Charter and related African human rights statutes, thus building a human rights culture by concretising and giving practical meaning to

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[62] Harlow (n 4 above) 14.
[63] R Murray & D Long *The implementation of findings of the African Commission on Human and Peoples Rights* (2015) 115 – 116.
[64] C Chinkin 'Sources' in D Moeckli *et al International human rights law* (2010) 88.

the vague but important norms of human rights law in the process. It appears that *amicus curiae* participation has become and will remain in the foreseeable future, a critical feature of African regional human rights litigation. If properly regulated and used, this device bears an enormous potential to assist the African human rights judiciary to unlock its transformative potential and deliver on the promise of the protection of human rights on the continent.

Overtime, the reforms they advocate in courts of law may yield a fundamental sea of change in the attitudes and practices of states, which are the main violators of human rights. It is envisaged that the potentially facilitative and transformative role of *amici curiae* will be critical in the emerging trend towards constitutionalism in the African region.[65] At a symbolic level, the participation of *amici curiae* would underline the fundamental fact that the protection of the rights contained in the African Charter and other related treaties is not a solitary enterprise but requires a collective effort.

The interpretive organs of the African system are therefore encouraged to accept *amicus* briefs, particularly in paradigmatic cases with the potential to have extensive impact on public policy. Finally, the legitimatory potential of the *amicus* device is critical for the continuing vitality of the African human rights system. It is therefore concluded that, on the balance, the *amicus* device is perceived as a normatively attractive device in the African human rights system, both on the informational and legitimatory grounds.

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